No. 392

SEP 14 1955

HAROLD B. WILEY, Clerk

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1955

L. C. COLLINS AND LUCILLE COLLINS, HIS WIFE;
EARL SCHNEIDER AND MILDRED SCHNEIDER, HIS WIFE;
VOLLIE L. WOODWARD AND LELA E. WOODWARD, HIS WIFE;
LEO R. MARLATT AND LEWIS C. MARLATT,
PETITIONERS,

vs.

THE CITY OF WICHITA, KANSAS,
A MUNICIPAL CORPORATION,
RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

KENNETH G. SPEIR,
VERNON A. STROBERG,
HERBERT H. SIZEMORE,
Suite 4, Harlin Building,
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To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioners: L. C. Collins and Lucille Collins, His Wife; Earl Schneider and Mildred Schneider, His Wife; Vollie L. Woodward and Lela E. Woodward, His Wife; Leo R. Marlatt and Lewis C. Marlatt, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit, entered in the

above-entitled case on August 4, 1955, which affirmed a judgment of the United States District Court for the District of Kansas sustaining the respondent's Motion for Summary Judgment on the complaint plus documentary exhibits submitted by the parties litigant.

CITATIONS TO OPINIONS BELOW.

The memorandum opinion of the United States District Judge (Rec. 286) is unreported and is printed in Appendix C hereto, *infra*, p. 36. The opinion of the court of Appeals is printed in Appendix C, hereto, *infra*, p. 36, and is .. reported in .. Fed. 2d ...

JURISDICTION.

The judgment of the Court of Appeals was entered on August 4, 1955, C. A. Rec. 14; p. 45, *infra*. Rehearing was denied on August 30, 1955. (C. A. Rec. 30)

The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

Under Kansas law condemnation proceedings may be attacked only by collateral proceedings. *State v. Boicourt Hunting Assn.*, 177 Kan. 637, 282 P. 2d 395; and the landowner cannot appeal from award of compensation and also challenge validity of condemnation proceedings, but must elect which remedy to pursue. *Reisner v. Strong*, 24 Kan. 410 (Dassler's Edition, 24 Kan. 297).

QUESTIONS PRESENTED.

The questions presented by this petition are:

1. Was "due process", under the 14th Amendment to the Constitution of the United States, accorded landowners whose lands were sought to be appropriated in a condemnation proceeding instituted by the City of Wichita, Kansas (condemning farm lands *outside* the city limits) when the only notice given them of such proceedings was by one (1) publication in the official city paper?

2. Was "due process", under the 14th Amendment to the Constitution of the United States, accorded landowners whose lands were sought to be appropriated in a condemnation proceeding instituted by the City of Wichita, Kansas, (condemning farm lands *outside* the city limits) when the only notice given them of such proceedings was by one (1) publication in the "evening issue" of a "newspaper" of general circulation in the county where the lands are located.

[Such "evening issue" is of limited circulation—only 5% of the total press-run is distributed outside the metropolitan area. Whereas the "morning issue" is of general circulation—25% of the total press-run is distributed outside the metropolitan area of such city.]

3. Was "the equal protection of the laws", under the 14th Amendment to the Constitution of the United States, accorded landowners whose lands (farm lands outside city limits) were sought to be appropriated in a condemnation proceeding instituted by the City of Wichita, Kansas, when the only notice *required and given* them

of such proceedings was by one (1) publication in the Official city paper; Whereas, the Kansas General Condemnation Statutes require others, including the State, to give *written notice in addition to notice by publication?*

4. In view of the holding by the Court of Appeals that the City Condemnation Statute was inadequate and that the General Condemnation Statute was applicable, then:

Does not "due process" require compliance with *all, not just one part*, of the applicable statute relating to the character, nature and extent of the notice to be given in certain condemnation proceedings?

5. Can a city condemn private property for the use and benefit of private enterprise, even though such private enterprise is a water utility company distributing water within, and in the vicinity of, such city?

6. In view of the uniform Kansas rule that a city has only such powers and authority as the Legislature has either expressly, or by necessary implication, granted or conferred upon it:

(a) Can a city condemn private property for a purpose not expressly, or by necessary implication, authorized by the Legislature?

(b) Can a city, in the absence of statutory authorization, lend its public credit to private enterprise (even though it be a water utility company) and condemn private property in furtherance of such abuse of the public credit?

(c) Can a city condemn private property in furtherance of an unauthorized joint venture or partnership with, or as agent for, a private corporation?

(d) Can a city condemn private property in furtherance of a business venture which it unlawfully operates at a loss, but attempts to make-up such deficit by imposing an unauthorized "surcharge" on water consumers?

7. Can a city condemn private property without specifying the use it proposes to make of such property with sufficient particularity so that the landowners can make a fair estimate of "just compensation"?

8. Can a city condemn private property for a water-pipeline and "other appurtenances" unless and until it has the right to obtain the water which it proposes to transport through such facilities, especially when its right to such water is either in litigation or no right thereto has been acquired?

9. Can a city acquire a valid right in private property by condemnation without strict compliance with the statute and the order of the court?

10. Are not condemnation proceedings which were conceived, conducted and completed in "calculated secrecy" absolutely void?

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED.

The statutory provisions involved are General Statutes of Kansas, 1949; 26-101; 26-201, 202, 203, 204, 205, 206 and 208. They are printed in Appendix B, *Infra*, p. 30.

The constitutional provisions involved are the "due process" and "equal protection" clauses of the 14th Amendment to the Constitution of the United States. Appendix A, *infra*, p. 29; of collateral concern is Article 12; Section 5 of the Kansas Constitution. Appendix A, *infra*, p. 29.

STATEMENT.

A. STATE COURT PROCEEDINGS IN CONDEMNATION.

Respondent purportedly condemned an easement in or right-of-way over forty-four (44) tracts of land situate in Sedgwick County, Kansas, (all of such tracts being outside the corporate limits of Respondent, the City of Wichita) by adopting a certain Resolution, enacting a certain Ordinance, and conducting certain proceedings in The District Court of Sedgwick County, Kansas, pursuant to General Statutes of Kansas, Chapter 26, Article 2 (D. C. Rec. 16).

Petitioners own, respectively, four (4) of the tracts of land involved in such condemnation proceedings; ownership of each tract being set forth in the complaint filed herein in the United States District Court for the District of Kansas. (D. C. Rec. 3)

About 14 months prior to instituting the condemnation proceedings challenged in this suit; the respondent, The

City of Wichita, instituted similar condemnation proceedings *for the same purpose* and *involving the same tracts of land.* However, the landowners "just happened" to learn of those proceedings and one of these Petitioners, L. C. Collins, sought and obtained leave from the District Court of Sedgwick County, Kansas, to intervene (being then represented by the same counsel who represent him, and the other Petitioners, in this suit); pursuant to Motion the State Court, in the first proceeding, on July 29, 1953, entered an order providing, in part as follows:

> "IT IS THEREFORE CONSIDERED, ORDERED, ADJUDGED AND DECREED that the City of Wichita, Kansas, give, or cause to be given, to Kenneth G. Speir, Newton, Kansas, Attorney for L. C. Collins, a full and complete copy of the report of commissioners in condemnation, prior to the filing thereof." (D. C. Rec. 158)

Subsequently and on April 6, 1954, Robt. B. Morton, then, and now an Assistant City Attorney for the City of Wichita (other counsel being then and now the same persons) wrote a letter to one of the counsel for Petitioners, Kenneth G. Speir, containing, among others, the following statement:

> "With regard to your letter of April 3, 1954, you have my assurance that, in compliance with the Court's Order of July 29, 1953, a copy of the Commissioners' Report will be furnished you prior to the filing of the same." (D. C. Rec. 172)

Notwithstanding *the pendency of the prior condemnation proceedings, and the above order and letter,* the City

of Wichita, on September 9, 1954, filed and completed the here-challenged condemnation proceedings in the same Court, the District Court of Sedgwick County, Kansas (being case No. A-51342), with the same counsel, and before the same Judge, who appointed the same persons as commissioners in condemnation.

All without actual notice to Petitioners' Counsel, Kenneth G. Speir or any of the landowners concerned (unless publication in the official city paper, D. C. Rec. 17, can be said to be notice), in spite of the City's, and its attorney's knowledge that, at least, Petitioner L. C. Collins, was represented by his present Counsel and in spite of the order in the prior proceedings and the letter above-set out.

The proceedings were fully completed on September 28, 1954. (D. C. Rec. 83)

The first condemnation proceedings were thereafter dismissed on September 30, 1954, (just 2 days after completion of the proceedings complained of in this suit!); without any notice whatever to L. C. Collins or his attorney.

No copy of the report of commissioners in condemnation was ever filed in the first proceedings and no copy of the report in the second proceedings (herein challenged) was furnished to Petitioners, their attorney or any landowner until receipt, by counsel, of a copy of the city's Brief and Exhibits, in the U. S. District Court proceedings, on February 6, 1955.

B. FEDERAL COURT PROCEEDINGS IN THIS CAUSE.

On October 20, 1954, (as soon as possible after their counsel "by chance" learned of the Respondent's proceedings in the State Court) Petitioners filed this suit for a Declaratory Judgment adjudging the second condemnation proceeding null and void and for a permanent injunction restraining Respondent from entering upon the lands of Petitioners. (D. C. Rec. 2)

The jurisdiction of the District Court was invoked under the 14th Amendment to the Constitution of the United States pursuant to 28 U. S. C. Sections 1331 and 2201.

On November 29, 1954, Respondent filed a Motion to Dismiss (D. C. Rec. 15), which on oral argument, was enlarged to a Motion for Summary Judgment. (D. C. Rec. 287) Respondent introduced certain exhibits in support of its Motion for Summary Judgment including, among others: Ordinance No. 20-2086 directing the institution of the condemnation proceedings here involved together with Proof of Publication thereof (D. C. Rec. 17); conformed copies of: (1) the condemnation proceedings here challenged (D. C. Rec. 20); (2) Report of commissioners in such condemnation with endorsements by City Clerk, City Treasurer, Clerk of the Court and Register of Deeds of Sedgwick County, Kansas (D. C. Rec. 107); and (3) certain portions of the first condemnation proceedings (D. C. Rec. 19) that was dismissed 2 days after completion of the proceedings here in question.

Petitioners also introduced certain Exhibits in opposition to the Motion for Summary Judgment, including, among others: conformed copies of certain portions of the first condemnation proceedings not included in Respondent's Exhibit with reference thereto (D. C. Rec. 158) and letter from Robt. B. Morton to Kenneth G. Speir, dated April 6, 1954. (Referred to and quoted from, *supra*, p. 7.)

Respondent's Motion for Summary Judgment was originally heard before a Three-Judge Court, which was thereafter dissolved, and the motion was thereafter decided by District Judge Hill, sitting as a Single-Judge District Court.

Respondent's Motion for Summary Judgment was sustained and judgment was entered in favor of the City. (D. C. Rec. 298), Memorandum by Judge Hill, Appendix C, *infra*, p. 36.

Petitioners appealed to the Court of Appeals for the Tenth Circuit on April 14, 1955. On April 18, 1955, the Court of Appeals entered an Order to Show Cause directed to the City of Wichita and also issued a Temporary Restraining Order.

On August 4, 1955, the Court of Appeals affirmed the District Court (C. A. Rec. 14) Opinion of the Court, Appendix C, *infra*, p. 45. Petition for Rehearing was timely filed and denied on August 30, 1955. (C. A. Rec. 30) Motion for Stay of Mandate was filed and allowed on September 2, 1955. (C. A. Rec. 30)

In its opinion, the Court of Appeals *held* the notice provision of General Statutes of Kansas 1949, 26-202

were inadequate (one (1) publication in the official city paper) but construed G. S. 1949, 26-208 as requiring application of G. S. 1949, 26-101, which requires written notice *and* one (1) publication notice in a newspaper of general circulation in the county where the land sought to be condemned is located, Opinion, Appendix C, *infra*, p. 50; however the Court of Appeals *did not require compliance* with *both* of the provisions of 26-101 relative to notice.

Respondent has never contended that written notice was ever given to these Petitioners, nor to any other landowner concerned; on the contrary, the City agrees that the only notice given was in the condemnation proceedings by publication in the official city paper.

C. ALLEGATIONS OF THE COMPLAINT.

The allegations of Petitioners' complaint filed in the District Court are particularly pertinent because all of such allegations are not only admitted by Respondent's Motion for Summary Judgment, but are to be construed in the light most favorable to Petitioners, unless, and only so far as, controverted by the Exhibits.

The material facts thus admitted are:

1. That the petition in condemnation was wholly insufficient in that it did not disclose the exact nature of the installations proposed to be installed upon the lands sought to be and allegedly condemned, and that by reason thereof, none of the petitioners, nor any of the landowners, nor any of the commissioners in condemnation, nor the court had any basis upon which to assess

damages to the lands sought to be condemned. (D. C. Record, Page 4)

2. That the City of Wichita did not condemn and will not use the lands for a lawful, authorized public purpose, but attempted to condemn said lands for the private use and benefit of the Wichita Water Company, a private corporation, organized for profit. (D. C. Record, Page 4)

3. That the City of Wichita does not distribute any water transported, or to be transported through the proposed pipeline, but sells it to the Wichita Water Company exclusively and, contrary to the Laws of Kansas, at a loss. To make up the loss thus sustained, the City has resorted to an unlawful and unauthorized surcharge. (D. C. Record, Page 5)

4. That the City of Wichita has, without any legal authority, lent its credit to a private enterprise, the Wichita Water Company, and that such unlawful lending of credit is directly involved in the alleged condemnation proceedings. (D. C. Record, Page 7)

5. That the City of Wichita did not attempt to condemn the lands for any lawful, authorized purpose. On the contrary, such condemnation was in furtherance of an unlawful and unauthorized joint venture or partnership with the Wichita Water Company and that the condemnation proceeding is, therefore, in furtherance of an unauthorized objective, not for the public use, but contrary to the public interest, and deprives these appellants of their property in violation of the 14th Amendment to the Federal Constitution. (D. C. Record, page 7)

6. That the alleged condemnation proceedings were premature and an unnecessary, arbitrary, capricious and unlawful effort to expend public funds. (D. C. Record, Page 7)

7. That the City of Wichita does not now have, and will in all likelihood never obtain, any permit to produce the water which it proposes to transmit through the proposed pipeline which the city proposes to install on the lands of these petitioners. (D. C. Record, Page 8)

8. That the condemnation proceedings were, in fact, conceived, instituted and conducted in calculated secrecy and in such a manner that these petitioners did not, in fact, receive any notice of the institution, pendency or completion thereof. (D. C. Record, Pages 8-9)

9. That the notices published were neither calculated to, nor did such notices give these petitioners any notice whatever of the condemnation proceedings. (D. C. Recoord, Page 9)

10. That the proceedings were not properly conducted. (D. C. Record, Page 9)

11. That the pertinent statutes under which the proceedings were conducted *do not provide for, nor require:*

a. Any notice with respect to the institution of condemnation proceedings.

b. Adequate notice to the owners of the meeting of the commissioners and of the assessment and appraisal of damages.

c. Any notice to the landowners of the filing of the report, or

d. Notice of the acceptance and the availability of the money awarded to the landowners;

as a result thereof, the owners of the land were deprived of their property without due process of law in violation of the 14th Amendment. (D. C. Record, Page 9)

12. That an actual controversy does exist between petitioners and the city, involving the validity of the condemnation proceedings and that petitioners do not have an adequate remedy at law, and will suffer irreparable injury. (D. C. Record, Page 10)

It would seem that a mere recital of the above conceded facts demonstrates conclusively that the condemnation proceedings here in question would in truth and in fact deprive these petitioners of their property, or an interest therein, without due process of law and that the petitioners, with complete propriety, have properly invoked the jurisdiction of this court to protect themselves against an invalid State Court proceeding whereby:

> "the title and ownership of and right of exclusive possession to the easements or rights-of-way taken by condemnation herein has vested and is hereby confirmed in the City of Wichita, Kansas,"

and wherein it was further ordered:

> "IT IS BY THE COURT FURTHER CONSIDERED, ORDERED, ADJUDGED AND DECREED that if any person or persons shall refuse, fail or neglect to deliver and/or surrender the peaceable possession of the easements or rights-of-way herein taken by condemnation to the City of Wichita, Kansas, the Clerk of this Court shall issue a writ of assistance direct to the Sheriff of Sedgwick County, Kansas, commanding the latter to remove from pos-

session of the premises the person or persons wrongfully withholding possession thereof and place in possession the City of Wichita, Kansas, condemnor herein."

(Excerpt from Order of Confirmation, Defendant's Exhibit B) (D. C. Record, Page 84)

REASONS FOR GRANTING THE WRIT.

1. The Court below has decided critical federal constitutional questions of law in conflict with the applicable decisions of this Court and has departed so far from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

(a) INADEQUACY OF NOTICE.

The Court below noted (footnote to opinion, Appendix C, *infra*, p. 47), but failed to apply the controlling principles of "due process" set forth by this Court in the case of *Mullane v. Central Hanover Bank & Trust Co.*, 339 U. S. 306; 94 L. Ed. 865; 70 S. Ct. 652, which were reiterated in the case of *City of New York v. N. Y., N. H. & H. R. Co.*, 344 U. S. 293; 97 L. Ed. 336; 73 S. Ct. 299. The *Mullane* case, *supra*, admittedly involved trust proceedings, and the New York case, *supra*, involved bankruptcy proceedings, however the principles therein set forth can, and must be applied to these condemnation proceedings.

Clearly, rights in land are more important than theoretical liens in bankruptcy or potential adverse claims of or misfeasance by a trustee!

No entry was made, or even attempted upon the lands of Petitioners by the Respondent until long after completion of these condemnation proceedings. No actual notice of these proceedings was ever given these Petitioners, or their Counsel, by the Respondent, although the City of Wichita and its agents and attorneys, were only too well aware of who they were and where and how they could be notified.

The record shows, only too clearly, a determined effort by the Respondent to avoid actual notice to the Petitioners, their counsel, and the other land owners involved; the record also shows a studied concealment of the challenged proceedings, coupled with a calculated effort to "lull these Petitioners, and their counsel, into a sense of false security"!

The decision below is also in conflict, on principle, with the decision of the Court of Appeals for the Ninth Circuit in *Gillespie v. Fort Dodge, D. M. & S. Ry. Co.*, 203 F. 2d 119; Certiorari denied, 346 U. S. 827; 98 L. Ed. 352. Although the *Gillespie* case involved railroad reorganization proceedings, the principles of "due process" there stated, and approved, are equally applicable in this case.

The question: "what kind of notice is due process?" is of ultra importance to every citizen and to every Court, Federal and State, therefore this Court should grant Certiorari herein and *summarily reverse* the lower Courts upon the authority of the *Mullane* and *City of New York* cases.

Petitioners respectfully submit that summary reversal of the lower Court will make "crystal clear" what is *not* "due process".

(b) INADEQUACY OF DISCLOSURE OF THE USE TO WHICH THE LAND CONDEMNED WILL BE PUT.

The Court below recognized that the use to which the land condemned is to be put is a prime factor in determining "just compensation" (Opinion, Appendix C, p. 52) and also took notice of the fact that the Respondent City claimed it did not know the uses to which the land would be put except that it planned to lay a 66 inch pipeline, *among other things*, (Opinion, Appendix C, p. 52); however, the Court failed to apply the case of *Cincinnati v. Vester*, 281 U. S. 439, 74 L. Ed. 950, 50 S. Ct. 360, which Petitioners argued, and here submit, is controlling.

In the *Cincinnati* case, this Court held that a resolution expressing the purposes as being "in furtherance of said widening of Fifth Street" and "necessary for the complete enjoyment and preservation of said public use," and the ordinance not being more specific, the condemnation proceedings conducted thereunder were void. In the course of the opinion, this Court said:

> "To the end that the taking shall be shown to be within its authority, the municipality is called upon to specify definitely the purpose of the appropriation." (281 U. S. 439, 447)

Applied to the instant case the principle stated reads:

> "To the end that the landowner shall be assured of just compensation, the municipality is called upon

to specify definitely the use to which the property will be put."

further on in the opinion this Court also said:

> " . . . To define is to limit, and that which is left unlimited, and is to be determined only by such future action as the city may hereafter decide upon, is not defined. The citys contention is so broad it defeats itself." (281 U. S. 439, 448)

The purpose of the condemnation and the use to be made of the lands, as stated by the Respondent, was:

> "In the matter of the condemnation of certain private property in SEDGWICK COUNTY, KANSAS, for the purpose of laying, installing, maintaining and operating pipes, lines, mains, electric transmission control and communication circuits *and other appurtenances necessary for the construction, extention and improvement of the water supply and water works* system of the CITY OF WICHITA, KANSAS, for the purpose of supplying said City and its environs and inhabitants thereof with water." (D. C. Rec. 20) (Emphasis supplied)

Certainly the phrase "other appurtenances necessary for the construction, extension and improvement of the water supply and water works system of the City of Wichita, Kansas," is not only extremely comprehensive but also extremely vague. Any number of different and obnoxious installations could, and may be made under such a loose description of purpose and use, but the landowners were entitled to know just *what use* and *what installations* would be made in order to ascertain whether or not they were "justly compensated" and not be left to speculate thereon.

As of this date, the Petitioners still do not know just what use the Respondent will, or may, make of their lands!

It seems inconceivable that the Respondent City did not truly, and in detail, know precisely what it was going to do to or on these lands at the time it started condemnation proceedings; but if it did not, then it seems clear that it did not want to know, in order that it might decline to inform the appraisers and the landowners!

On page 7 of Petitioners' Petition for Rehearing to the Court of Appeals is a photograph of *one* of "the other appurtenances" (C. A. Rec. 21). At the time the photograph was taken, August 16, 1955, the structure was approximately one-half finished!

The nature and extent of disclosure of the use to which condemned lands will be put that is required by the 14th Amendment is of extreme importance to every property owner, every entity having and exercising the right of Eminent Domain and every Court or public agency having jurisdiction in condemnation proceedings.

It is essential that this Court should lay down a clear and concise rule so that there shall be no unfair advantage taken of the landowners and that henceforth in condemnation proceedings it shall be necessary to properly and adequately disclose the use intended.

Petitioners respectfully submit: that *Cincinnati v. Vester*, 281 U. S. 439, 74 L. Ed. 950, 50 S. Ct. 360, is controlling, this Court should grant Certiorari, and summarily reverse the lower Court upon the principles therein stated.

Summary reversal is indicated to unequivocally demonstrate that this Court will not approve concealment of material matters in condemnation proceedings and make it clear that nothing less than complete candor and fair play is permitted under the 14th Amendment.

2. The lower court so far departed from the accepted and usual course of judicial proceedings and judicial construction of statutes as to call for the exercise of this Court's power of supervision.

The lower court *expressly found* that General Statutes of Kansas 1949, 26-202, relating to notice, was *inadequate;* it also found that both the Respondent and the State Court intended to and did, in fact proceed under that statute and none other.

The Court of Appeals correctly held that G. S. 1949, 26-208, called for the application of the General Condemnation Statute (G. S. 1949, 26-101), but *held* that compliance with *only one of the two* requirements therein contained was, *nevertheless, adequate.* (Opinion, Appendix C, *infra,* p. 51)

It needs no citation of authority to support the statement: "One is not two" nor "It is not compliance to meet *only one of two* requirements."

Nor does it require any citation of authority to support the proposition that: "If due process requires the application of a particular statute relating to notice, then all of the requirements therein contained must be met, otherwise a person has been deprived of his property without due process of law."

Kansas has, on several occasions, recognized the propriety of substituting "and" for "or". (*Rostocil v. United Oil & Gas Royalty Assn.*, 177 Kan. 15, pp. 22 and 23; 274 Pac. 2d 761, p. 767; and cases therein cited.)

Inasmuch as the Court of Appeals held General Statutes of Kansas 1949, 26-202, as written inadequate, as applied to this case, it should have construed "or" as "and"; thereby requiring actual written notice to the landowners, as well as notice by publication. Thus construed, the statute would then have met the requirements of "due process" without having to go to G. S. 1949, 26-101.

Such construction would have been fully justified in view of the holdings by this Court, (*supra* p. 15) and upon the following remarks by the Kansas Judicial Council made in connection with the proposed (and subsequently adopted) Kansas Probate Code:

> "Notice by mail is made obligatory by this section, *as notice by publication of itself in the larger cities is practically no notice at all.*" 13 Kansas Judicial Council Bulletin 51, April, 1939. (Emphasis supplied)

and the remarks of W. W. Harvey (then Justice, now Chief Justice, of the Supreme Court of Kansas):

> "Another maxim which has come to us from the experience of ages, and accords with common sense and fair dealing, is that when any important matter is to be determined by a court *all those having an adverse interest should have notice of the contemplated action and an opportunity to be heard.* The inadequate method under which that is done under the present procedure for handling business

in probate courts has resulted, and continues each year to result, in substantial financial loss to heirs, beneficiaries under wills, and others interested in estates." (Justice W. W. Harvey in 12 Kansas Judicial Council Bulletin 102, July, 1938. (Emphasis supplied)

The applicability of the above quotations to proceedings designed to actually take a part, or all, of a person's land (and livelihood) is only too apparent and require reversal hereof.

Petitioners respectfully submit, the lower courts could, and should have taken judicial notice of the inadequacy of the notice prescribed by G. S. 1949, 26-202, and adjudged the challenged condemnation proceedings invalid on the strength thereof.

Petitioners submit that the lower court is so far in error as to justify Certiorari to correct an obvious deprivation of a right protected by the very purpose of the 14th Amendment.

3. The decisions of the lower courts on important State questions are in apparent conflict with decisions of the Kansas Supreme Court and State Constitutional and statutory provisions; such questions also involve Petitioners' rights under the 14th Amendment to the Federal Constitution. (Questions 6(a), (b), (c) and (d).)

The lower court did not discuss nor rule expressly upon such questions, except by reference to *State ex rel. v. Hedrick, infra,* Appendix D, p. 53, but all were distinctly raised and briefed by Petitioners.

Petitioners believe that such questions are of sufficient importance to justify this Court taking jurisdiction.

By ignoring, and thus by implication deciding, the questions or approving certain practices the lower court has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

The Court of Appeals cited the decision of the Kansas Supreme Court in the case of *State ex rel. v. Hedrick*, 178 Kan. 135; 283 Pac. 2d 437, (Appendix C, *infra*, p. 52) with approval and as controlling on these questions; however, the Kansas Supreme Court expressly *declined* to rule on the validity of the arrangement between the City and the Water Company:

> " . . . the appellants make no direct contention that the ordinance of the City of Wichita granting a water distributing franchise to the company is illegal or invalid, and when capacity of the present plaintiff to raise the question and the power of the Harvey County District Court to decide it even though the Water Company was a party, and it is not, are considered, *it is apparent such indirect contention as is made cannot be ruled on.*
>
> . . . *For present purposes,* we are of the opinion *it is of no concern to the Appellants how the city distributes the water which it obtains* for its uses or whether it may do the same by its own distribution system, if it had or has one, or by contract with someone like the company, for the end result is to supply the city and its inhabitants with water, in itself a legal function under its governmental and police power." (Opinion, Appendix D, *infra*, p. 60) (Emphasis supplied)

However, Petitioners *are concerned* because a part of their land is being taken for, or in furtherance of, unlawful, unauthorized purposes. Who has any better right to challenge the taking and invoke the protection of the 14th Amendment to the Constitution of the United States? Petitioners are not asking for any relief on the ground that it impairs the rights of others, on the contrary, *Petitioners' rights are directly at stake!*

The Supreme Court of Kansas has uniformly held, "that a municipality has only such powers as are expressly conferred upon them by the Legislature (See *State ex rel. v. Topeka,* 176 Kan. 240, 270 Pac. 2d 270; *State ex rel. v. Coffeyville,* 127 Kan. 663, 274 Pac. 258). See also *State ex rel. v. Kaw Valley Drainage District,* 126 Kan. 43, top of p. 49; 267 Pac. 31, and cases therein cited, with respect to the declared policy of the State of Kansas.

In connection with the exercise of the power of Eminent Domain by a City, the Supreme Court of Kansas, in the case of *Barker v. Kansas City,* 146 Kan. 347, 364, 70 Pac. 2d 5, construed G. S. 1949, 26-201 (the statute relied upon by the City of Wichita in this condemnation proceeding) as follows:

> " . . . The phrase should be interpreted as though it read, '*for any purpose whatsoever for which a city is authorized to take private property for public use*'." (Emphasis supplied)

The Allegations of the Complaint summarized *supra,* pp. 11-15, which were admitted by the Motion for Summary Judgment demonstrates conclusively that the Court

of Appeals failed to apply controlling decisions of the Supreme Court of Kansas, and for that reason this Court should take jurisdiction, grant certiorari, and decide these questions which are of particular concern not only to Kansas Municipalities, but also to all municipalities.

4. The decision of the Court of Appeals is in direct conflict with *Kohl v. U. S.*, 91 U. S. 367; 23 L. Ed. 449, p. 452, wherein this Court said:

> "The proper view of the right of eminent domain seems to be, that it is a right belonging to a sovereignty to take private property for its own public uses, and not for those of another."

The City of Wichita does not distribute any water, its sole "customer (!)" is the Wichita Water Company. The Complaint alleges, and the Motion admits, that the City of Wichita did not condemn and will not use the lands for a lawful, authorized public purpose, but attempted to condemn said lands for the private use and benefit of the Wichita Water Company, a private corporation organized for profit. (D. C. Rec. 4)

Under the circumstances, the city is not a "public utility", not being engaged in general commercial distribution of water (See *State ex rel. v. Coffeyville*, 138 Kan. 909; 28 Pac. 2d 1032); nor does it own and operate a waterworks system. It has only the production, transportation to the treatment plant, and treatment facilities, none of which are of any value unless the water can be distributed to the ultimate consumer, but distribution is wholly owned and controlled by the Wichita Water Company, a private corporation. (See *Stewart v. Gish*, 109

Kan. 206, 209; 198 Pac. 259, on joint or partnership operations by governmental agencies.)

As to the Respondent's power to lend the public credit —see Article 12, Section 5 of the Kansas Constitution, Appendix A, *infra*, p. 29

5. The Court of Appeals also failed to apply the principle of law stated in the case of *Cincinnati v. Vester*, 281 U. S. 439, 448; 74 L. Ed. 950 956, to the effect that "the power conferred upon a municipal corporation to take private property for public use must be strictly followed"; and the Kansas rule is to the same effect, *Strain v. Cities Service Co.*, 148 Kan. 293, 295; 83 Pac. 2d 124. (See also 18 Am. Jur. 957, Eminent Domain, Sec. 312)

General Statutes of Kansas 1949, 26-202 provides in part:

> " . . . and *at the time fixed* by such notice shall, *upon actual view*, appraise . . . ." (Emphasis supplied)

and the Order of Court directed:

> "IT IS BY THE COURT FURTHER ORDERED that said commissioners shall *at the time and place specified in said notice view said premises* and appraise . . . " (D. C. Rec. 48) (Emphasis supplied)

however, the notice by the commissioners fixed the place of their meeting at the City Commission Room, 201 City Building, Wichita, Kansas, (D. C. Rec. p. 53), *not on, at, or even near* the land in question!

The Report of the Commissioners recites that they met at *the time and place specified in the notice* and had

viewed and appraised the land *prior* and *subsequent to the date set* (D. C. Rec. 54) showing, *on its face, non-compliance* with the statute and the Order of the Court.

Under the decision in the case of *Oliphant v. Commissioners of Atchison County*, 18 Kan. 386, 398, such failure on the part of the commissioners in condemnation made the proceedings void.

6. No proceeding to take private property can be valid, if conceived, conducted and completed in calculated secrecy; otherwise the "due process" clauses of the Federal Constitution would be completely meaningless.

Petitioners submit, even without the admission made by Respondent by its Motion for Summary Judgment, that the record of the City's conduct in these condemnation proceedings (especially in view of what transpired in the first proceedings, *supra*, page 7) clearly, and beyond any shadow of a doubt demonstrates the truth of the allegations of the Complaint, *supra*, p. 13, No. 8, (D. C. Rec. 9)

It would seem that common courtesy, between lawyers, would have demanded some notice to Counsel for Petitioners, of the challenged proceedings, even if Respondent recognized no legal or moral obligation to the Petitioners and other landowners.

How then could the District Court and the Court of Appeals approve, by implication, such conduct?

Petitioners respectfully submit that tacit approval of such conduct is such a departure from accepted standards of judicial proceedings (and professional conduct) as to warrant, if not require, this court's granting cer-

tiorari in order to exercise its power of supervision; and correct a gross error and injustice.

7. Petitioners have been informed by counsel for the Plaintiff-Appellant, in the case of *Walker v. City of Hutchinson*, 178 Kan. 263, 284 Pac. 2d 1073 (Opinion, Appendix D, *infra*, p. 61) that an appeal is being, or will be taken from the Supreme Court of Kansas to this Court. That case also directly involves the validity of General Statutes of Kansas 1949, 26-202, (the same statute here involved) under the 14th Amendment to the Constitution of the United States.

Inasmuch as a case involving the validity of the same statute will be before this court on appeal, this Court should grant certiorari, in any event, pending decision of the appealed case.

CONCLUSION.

In view of the importance of the questions presented, and the clear error of the Court of Appeals on vital constitutional questions, Petitioners respectfully submit that this Petition for a Writ of Certiorari should be granted.

Dated: September ....., 1955.

Respectfully submitted,

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Newton, Kansas,
Counsel for Petitioners.

Of Counsel for Petitioners:
VERNON A. STROBERG,
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Both of Newton, Kansas.

APPENDIX A.

To the U. S. Constitution:

Amendment 14.—RIGHTS AND IMMUNITIES OF CITIZENS

Note: Proclamation declaring fourteenth amendment ratified dated July 28, 1868. (Kansas ratified previous to date of said proclamation.)

SECTION 1. **Citizenship; privileges or immunities; due process clause.** All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Article 12, Section 5, of the Kansas Constitution:

§ 5. **Cities.** Provision shall be made by general law for the organization of cities, towns and villages; and their power of taxation, assessment, borrowing money, contracting debts and loaning their credit, shall be so restricted as to prevent the abuse of such power.

APPENDIX B.

Chapter 26.—EMINENT DOMAIN

Article 1.—GENERAL CONDEMNATION LAW

26-101. Condemnation by corporations and partnerships; petition to court; appraisers, notice; deposit. Any corporation having the right of eminent domain, except railroad and interurban railway corporations, and any partnership holding a certificate of convenience issued by the state corporation commission and having the right of eminent domain, shall exercise such right in the following manner: Whenever such corporation or partnership desires to acquire land for a lawful purpose, it shall present to the district court of the county wherein the land is situated, or to the judge thereof, a petition setting forth the purpose for which the land is sought to be acquired, a description of each lot and parcel of ground and the name of the owner of each lot and parcel of ground as shown by the records of such county. The court or the judge thereof shall examine said petition and deteremine whether the petitioner has the power of eminent domain and whether said lands are necessary to its lawful corporate purposes, and if found in the affirmative, such finding shall be entered in the record and the court thereupon shall appoint three disinterested householders of said county to view and appraise such lots and parcels of ground. Such appraisers shall take an oath to well and truthfully make such appraisal and shall report their appraisement of each tract in writing, under oath, to the said court or judge thereof, and the same shall be filed with the clerk of the district court. *The appraisers so appointed shall give any owner, and all lienholders of record, of the property sought to be taken, at least ten days' notice in writing of the time and place, when and where the damages will be assessed and by one publication in a newspaper of general circulation in the county where such property is situated, and at the time fixed by such notice shall, upon actual view, appraise the value of the lands taken and assess the damages done to the*

owners, respectively, by such appropriations. In case of failure to meet on the day designated in said notice, they may meet on the following day, without further notice; and in case of failure to meet within the time herein specified, new notice shall be given as hereinbefore provided.

If the petitioner desires to acquire the land at the appraised price it shall within thirty days deposit with the clerk of the district court the total amount of such appraisement, shall pay the court's costs and the fees of the appraisers, to be fixed by the court or the judge thereof, and the title to all such lots and parcels of ground thereupon shall immediately vest in the said petitioner, and the said petitioner shall be entitled to the immediate possession thereof and all remedies provided by law for the security of such title and possession. If the petitioner shall not within thirty days comply with all of the terms of such condemnation or appeal therefrom, judgment for the costs of such proceeding, including appraisers' fees, shall be entered against the petitioner as in other cases. (Emphasis supplied)

Article 2.—CONDEMNATION IN CITIES

26-201. Private property for city purposes; survey; ordinance fixing benefit district; application to district court; commissioners. Whenever it shall be deemed necessary by any governing body of any city to appropriate private property for the opening, widening, or extending any street or alley, or to condemn private property or easement therein for the use of the city for any purpose whatsoever, the governing body shall cause a survey and description of the land or easement so required to be made by some competent engineer and file with the city clerk. And thereupon the governing body shall make an order setting forth such condemnation and for what purpose the same is to be used. If in the opinion of the governing body any property is specially benefited by the proposed improvement such property shall be designated as

the benefit district and the same shall be fixed by ordinance. The governing body, as soon as practicable after making the order declaring the appropriation of such land necessary and the fixing of the benefit district, if any is fixed, shall present a written application to the judge of the district court of the county in which said land is situated describing the land sought to be taken and setting forth the land necessary for the use of the city and setting out the benefit district in full and praying for the appointment of three commissioners to make an appraisement and assessment of the damages therefor.

26-202. Notice to property owners or lienholders of record; appraisement and assessment of damages; reports. *The commissioners appointed by the judge of the district court shall give any owner and any lienholder of record of the property sought to be taken at least ten days' notice in writing of the time and place when and where the damage will be assessed, or by one publication in the official city paper, and at the time fixed by such notice shall, upon actual view, appraise the value of the lands taken and assess the other damages done to the owners of such property, respectively, by such appropriations.* For the payment of such value and damages the commissioners shall assess against the city the amount of the benefit to the public generally and the remainder of such damages against the property within the benefit district which shall in the opinion of the appraisers be especially benefited by the proposed improvement. The said commissioners may adjourn as often and for such length of time as may be deemed convenient, and may, during any adjournment, perfect or correct all errors or omissions in the giving of notice by serving new notices or making new publication, citing corporations or individual property owners who have not been notified or to whom defective notice or insufficient notice has been given, and notice of any adjourned meeting shall be as effective as notice of the first meeting of the commissioners. And the commissioners may from time to time make partial reports, and upon completing their

duties shall make a final report. All reports shall be in writing and filed in the office of the city clerk. Notice to any railroad company or other corporation may be served upon any officer or agent thereof or upon any other owner, if found within the district, in lieu of such notice by publication. (Emphasis supplied)

26-203. Duties of commissioners. That said commissioners shall, in their reports, accurately describe the lands by them set off and appropriated, the purpose for which the same are taken, the name of such owner, if known, and shall appraise each owner's interest and assess his damages separately, if his title can be ascertained from the public records in the office of the register of deeds.

26-204. Disposition of report; deposit and payment of award; title and possession. That the city clerk shall forthwith, upon any report being filed in his office, prepare and deposit a copy thereof in the office of the treasurer of such city, and if there be deposited with the city treasurer, for the benefit of the owner or owners of such lands, the amount of the award, such treasurer shall thereupon certify such facts upon the copy of the report, and shall pay said awards to such persons as shall be respectively entitled thereto. In all cases where the names of the owners or ownership of lands condemned by the governing body of any such city are unknown, uncertain or disputed, it shall be sufficient to deposit the award made on account of the condemnation of such land with the city treasurer for the benefit of the unknown owners thereof. The title to lands condemned by any city for parks, parkways or boulevards shall vest in such city upon the publication of the resolution of the governing body condemning the same. Upon the recording of a copy of said report so certified in the office of the register of deeds of the county, the right to the possession of lands condemned shall vest in the city and the city shall have the right to forthwith take possession of, occupy, use and improve said lands for the purposes specified in the resolution appropriating the same.

26-205. Appeal from award; notice; bond; effect of appeal. That any person being or claiming to be the owner of any lands so condemned or appropriated or any lienholder of record, and deeming himself aggrieved by the decision or award of said commissioners, may appeal from their award as to the value of the land, crops, buildings and other improvements thereon, and for all other damages sustained by such person by reason of the appropriating of such lands, by filing with the clerk of the said court, within thirty days after the filing of the decision or award of said commissioners, written notice of appeal, and giving bond for the costs thereof, to be approved by said clerk, and thereupon an action shall be docketed and tried the same as other actions, *but said appeal and subsequent proceedings shall only affect the amount of compensation to be allowed,* and shall not delay the taking possession, occupation, use or improvement of such lands, upon the paying or depositing the amount so assessed by said commissioners with the city treasurer as aforesaid. (Emphasis supplied)

26-206. Abandonment of proceedings, resolution; appeal by city; possession upon payment of award. That if the governing body of any city shall deem such city aggrieved by any appraisement, assessment of damages or award by said commissioners made to any owner or claimant of land sought to be appropriated it may, by resolution adopted within ten days after the filing of such report, abandon the condemnation of any lot or tract of land, or it may appeal therefrom, in the same manner as provided for appeals by the owner of lands in the preceding section, except that the city shall not be required to file any bond for costs, and in case of such appeal shall not be required to make any deposit of money with the city treasurer or have any right to occupy the land condemned pending such appeal, but upon final judgment of such appeal said city may pay the amount awarded to the land owner into court and thereupon shall have the right to occupy the land for which the award is made.

26-208. Condemnation of land outside city. Where the governing body of any city, or any other board or commission of such city, is authorized to condemn land outside the city limits for the use of such city or any public utility owned by such city, the same proceedings shall be had as though such land were located within such city, *so far as the procedure relating to cities shall be applicable.* (Emphasis supplied)

APPENDIX C.

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS

L. C. COLLINS, et al.,)
Plaintiffs)
vs.)
THE CITY OF WICHITA, KANSAS,)
a Municipal Corporation,)
Defendant)

MEMORANDUM

This suit is of a civil nature and is brought for the purpose of obtaining a declaratory judgment; that a certain condemnation proceeding brought in the District Court of Sedgwick County, Kansas, by the defendant, the City of Wichita, Kansas, a municipal corporation, is null and void; and for consequential relief as a result of said declaratory judgment, granting to these plaintiffs a permanent injunction, restraining and enjoining the defendant, the City of Wichita, Kansas, its agents, employees and all other persons in active participation with them, from proceeding further with said alleged condemnation and from entering upon the lands of these plaintiffs.

This action arises under the 14th Amendment of the Constitution of the United States, as hereinafter more fully appears, and the matter in controversy exceeds, exclusive of interests and costs, the sum of Three Thousand ($3000.00) Dollars.

At a pre-trial conference on the City's motion to dismiss, both parties offered relevant record evidence, after which the City moved for summary judgment on the grounds that the court lacked jurisdiction, and on the further ground that it was entitled to judgment on the pleadings and record evidence. At the bar of this court,

the parties agreed that no material issue of fact survives the pleadings and the record evidence, and that the case is ripe for summary judgment.

The record evidence shows without dispute that on September 7, 1954, the Board of Commissioners of the City of Wichita, in a regular session, enacted Ordinance No. 20-386 entitled "an ordinance approving the description and survey of certain easements or rights of way in, on, over and to certain private lands and property necessary to be acquired by proceedings in eminent domain for the purpose of laying, installing, maintaining and operating pipes, lines, mains, electrical transmission, control and communication circuits, and other appurtenances necessary for the construction, extension and improvement of the water supply and water works system of the City of Wichita, Kansas, for the purpose of supplying said City and its environs and the inhabitants thereof with water." And the Ordinance provided in effect that the Office of the City Clerk, the City Engineer and consulting engineers having declared it to be a public necessity to acquire by proceedings in eminent domain the particularly described easements and rights of way, the City Attorney make proper application to a judge of the District Court of Sedgwick County for the appointment of commissioners or appraisers to appraise and value such easements or rights of way, and to provide for the payment of the cost of the improvement. The acquisition of the easements and rights of way in and over the described property in Sedgwick County by proceedings in eminent domain for the purposes set out in the preamble was declared to be a public necessity. The Ordinance then proceeded to describe all of the lands to be taken, including the lands of the plaintiffs here. The Ordinance provided that the costs of the improvements when ascertained, should be paid from the proceeds of the general obligations of the City of Wichita authorized to be issued and sold by an affirmative vote of the qualified voters of the City of Wichita at a special election held on November 4, 1952.

The Ordinance was published in an official newspaper of the City of Wichita and County of Sedgwick, Kansas, on September 8, 1954. On the day following the publication September 9th, the defendant City filed a petition to condemn in the District Court of Sedgwick County, Kansas, setting out the Ordinance and its publication, and alleging the acquisition of the described property to be a public necessity and for public purposes. The power of eminent domain was invoked for the condemnation of the described property and the court was petitioned to appoint commissioners to assess the value of the property taken as provided by state law. On the same day, the district court, after examination of the petition and evidence in support thereof, specifically found that all the statements and allegations contained therein were true, and that by virtue of the terms of Ordinance No. 20-386, it was declared necessary to take and condemn certain private lands in Sedgwick County, Kansas, including the lands of these plaintiffs, for the purpose of laying, installing, maintaining and operating pipes, lines, mains, electrical transmissions, control and communication circuits and other appurtenances necessary for the construction, extension and improvement of the water supply and water works system of the City of Wichita, and for the purpose of supplying said City and its environs thereof with water.

The Court further found that the City of Wichita had the power of public domain, and that the Ordinance was necessary to the City of Wichita's lawful corporate purposes of providing an adequate water supply for its inhabitants. The Court then proceeded to appoint three freeholders as a commission to hear and assess the damages for the taking of the described property. And, the Court further ordered that the petitioners give ten days notice in the official paper of the City of Wichita of the appointment, of time and place they would convene for the assessing and fixing of damages for the taking of the described property. The order also pertinently provided that the commissioners should view the premises and

appraise the value of the lands taken and assess the damages caused by such appropriation.

The commission was thereafter duly constituted and on September 15, 1954, ten days' notice of the meeting of the commission was published in the official paper. The notice gave the style of the condemnation proceedings and the purpose of the proceedings; it also set out the parties interested in the described tracts of land, and notified said parties that the commissioners had qualified to view and appraise the value of the land taken and to assess the damages for the lands taken as set out in City Ordinance No. 20-386. The interested parties were thereby notified that the commissioners would meet in the City Commission Room Number 201 at the City Building of Wichita on September 27, 1954, there to appraise the value of the lands taken and to assess the damages to the owners of such appropriated lands. The Commission did meet pursuant to the notice and it did assess the damages to the property taken, including the property involved here.

The report of the Commissioners was filed on September 28th, 1954, and confirmed on September 30th, by the District Court. The title and ownership and the right of exclusive possession to the easements and rights of way condemned was vested in the City of Wichita, and the damages were made available to the owners of the appropriated lands as provided by state law. These proceedings were thereupon instituted on October 20th, 1954.

Federal jurisdiction lies to challenge the constitutionality of a state statute on the grounds of its repugnancy to the due process clause of the 14th Amendment, provided of course that the requisite amount in controversy is present.

Three legal questions are rasied by the pleadings and arguments of counsel. 1) That the condemnation proceedings challenged herein are void because the statute on which they are based is unconstitutional in that it does

not provide for notice sufficient to accord the plaintiff landowners herein due process of law; 2) that the condemnation proceedings are void because the land is not condemned for a public purpose; and 3) that the proceedings are void because the petition in condemnation filed in the state court, based on the city ordinance No. 20-386, is not sufficiently definite about the use to which the land will be put, and therefore does not furnish adequate basis for awarding damages to the landowners hence denies due process of law to them for that reason. These questions will be considered in the order they appear above.

G.S. 1949, 26-202, provides in substance that the commissioners appointed by the judge of the district court in a condemnation proceedings shall give any owner of property sought to be taken at least ten days' notice in writing of the time and place when and where the damage will be assessed or by one publication in the official city paper, and at the time fixed by such notice shall, upon actual view, appraise the value of the lands taken. There is no contention that the City of Wichita did not comply with the notice requirements of this statute. Plaintiffs simply say that the taking of their property by condemnation proceedings based upon notice by publication in a newspaper of city circulation does not afford them the notice which the 14th Amendment commands as an essential ingredient of due process of law. In that regard, our attention is called to the fact that the lands are located outside of the City of Wichita and the plaintiffs reside outside of the City; that if private property can be taken on notice of this kind by the City, it could be taken in any county in the State of Kansas; and that the statute is therefore void upon its face for failure to provide notice and a fair hearing.

In the first place, while the lands taken are located outside the City limits, they are in Sedgwick County and within the jurisdiction of the court in which the lands were condemned. Notice in its constitutional sense and as applied to the initiation of condemnation proceedings

must be "reasonably adapted to the nature of the proceedings and their subject matter, and afford to the property owner reasonable opportunity at some stage of the proceedings, to protect his property from an arbitrary and unjust appropriation". 18 Am. Jur. Eminent Domain, §323, p. 967; North Laramie Land Co. v. Hoffman, 268 U.S. 276; Anderson National Bank v. Luckett, 321 U.S. 233, 246. From the earliest times, it has been held that personal service is not a constitutional requirement in a condemnation proceedings. Taking by constructive notice has been repeatedly sustained. See North Laramie Land Co. v. Hoffman, supra; Huling v. Kaw Valley Ry. Co., 130 U.S. 559; 18 Am. Jur. Eminent Domain, p. 967; Merrill on Notice §518. The challenged state statute has been in effect in substantially its present form at least since 1913. Statutes of similar import have been repeatedly sustained in the face of their challenged constitutionality for failure to accord due process. See Merrill on Notice, Vol. 1, §514. Moreover, applicable Kansas statutes provide for a judicial review of the award of the commissioners in condemnation, and a trial by jury. See G.S. 1949, 26-205. This subsequent review provides an adequate substitute for any prior notification. North Laramie Land Co. v. Hoffman, supra; Anderson National Bank v. Luckett, supra; Merrill on Notice, §523.

In this connection the record in this case shows that the plaintiffs herein had notice of the condemnation proceeding in time to avail themselves of the appeal provided by G.S. 1949, 26-205, since the award was confirmed on September 30, 1954, and the instant case was filed October 20, 1954. The time for appeal from this award provided by the above section is thirty days.

The plaintiffs take the alternative position that even though the notice provisions in the Kansas statutes be deemed to accord due process, the record conclusively shows that the property was not taken for constitutionally permissible purposes.

While the question of what is a public use is a judicial one, in the resolution of that question, courts must have appropriate regard for the diversity of local conditions and accord "great respect to legislative declarations, and in particular the judgments of the state courts as to the uses considered to be public in the light of local exegencies." Cincinnati v. Vester, 281 U.S. 439, 446. And in the consideration of the question of public purposes, courts must keep in mind that the legislature, not the courts, is the judge of the necessity, expediency and wisdom of the taking of private property for public use, and that on that question a hearing is not essential to due process under the 14th Amendment. Bragg v. Weaver, 251 U.S. 57, cited in North Laramie Land Co. v. Hoffman, supra. See also 18 Am. Jur. Eminent Domain §46, p. 675, and §333, p. 975.

Here, unlike Cincinnati v. Vester, supra, we have not only a legislative declaration that the property taken is necessary for the public purpose of providing an adequate water supply for the City of Wichita, but judicial declarations to that effect as well. Certainly the judgment of the Kansas court of competent jurisdiction is not open to collateral attack in this proceedings. And this is particularly true where the record shows that the parties now complaining in this court had actual notice of the proceedings and did not intervene to raise the question.

In that respect, our attention is called to the fact that a prior proceedings instituted in the District Court of Sedgwick County in which these complainants had intervened was dismissed after the conclusion of a subsequent proceedings herein outlined, and that it was done secretly and covertly for the purpose of depriving the complainants of adequate notice and due process. But the record does show that the parties did have actual notice of both proceedings, and since the statute is not unconstitutional upon its face, we will not try the regularity of the proceedings in the state court.

The record shows without dispute that the City of Wichita has by franchise let the distribution of water to the customers inside the city limits to a private corporation, the City of Wichita agreeing by the franchise ordinance to deliver the water supply to designated water gates. On this basis, the complainants contend that the improvements for which this land is condemned and taken are for the purpose of furnishing water to a private corporation, are not for a permissible public purpose, and the taking is therefore constitutionally prohibited.

Of course, one's private lands cannot be taken for private use even though just compensation is paid. But the improvements involved here are intended to provide facilities for supplying water to a private corporation, which by the terms of the franchise ordinance is required to distribute it to the people of Wichita, and while the water is sold to a private corporation, such private corporation is merely the instrumentality by which the City of Wichita has in its wisdom chosen to serve an essential public need; and it is for the City, not this court, to determine whether the public need may be served as well, or better, through an agency of private enterprise rather than through a department of government. See Berman v. Parker, 348 U.S. 26. The public purpose is not destroyed by the fact that some benefit will accrue to a private person by the taking. See Annot. at 53 A.L.R. 9.

As to the inadequacy of the petition in condemnation because of a failure to sufficiently describe the use to which the land would be put so as to furnish a basis for awarding consequential damages, plaintiff is unable to take advantage of the point here. As was noted in the consideration of the public purpose question, a Kansas State Court of competent jurisdiction has rendered a valid judgment on the question. Plaintiff is not aided by the fact that the question was raised to no avail in the previous suit which was dismissed. Plaintiff is bound to proceed in the forum having the case properly before it and if the state courts refuse to give relief from un-

constitutional acts, the remedy is by the avenue open to all litigants to the Supreme Court of Kansas and then to the Supreme Court of the United States where their supposed constitutional rights will be preserved if they are found to exist. A party is not free to ignore an action in a court of competent jurisdiction, of which he is bound to take notice, and complain of the court's action after the judgment has become final. In short, a collateral attack on the judgment of the state court, even on the ground of unconstitutionality, once it is determined that the court had jurisdiction and the aggrieved party had notice, is not permitted.

It is the conclusion of this court that the court has jurisdiction of the subject matter; that the Kansas statute under which the condemnation proceedings were brought is not unconstitutional and hence the condemnation proceedings in the District Court of Sedgwick County, Kansas, are valid; that the porperty taken by the condemnation proceedings was determined to have been taken for a public purpose by the District Court which determination is not open to question for the above assigned reasons; the sufficiency of the petition in the state court is likewise not open to question in this court. Therefore, summary judgment should be granted in favor of the defendant, City of Wichita, Kansas, and the temporary restraining order dissolved.

Delmas C. Hill
Judge.

IT IS SO ORDERED.

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

May Term, 1955

L. C. COLLINS and LUCILLE COLLINS, his wife; EARL SCHNEIDER and MILDRED SCHNEIDER, his wife; VOLLIE L. WOODWARD and LELA E. WOODWARD, his wife; LEO R. MARLATT, and LEWIS C. MARLATT, Appellants,

vs.) Number 5140

THE CITY OF WICHITA, KANSAS, a municipal corporation, Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS

Kenneth G. Speir (Vernon A. Stroberg and Herbert H. Sizemore were with him on the brief) for Appellants;

Robert B. Morton (Fred W. Aley and Lawrence E. Curfman were with him on the brief) for Appellee.

Before PHILLIPS, Chief Judge, HUXMAN and PICKETT, United States Circuit Judges.

HUXMAN, Circuit Judge.

This was a suit commenced in the United States District Court for the District of Kansas for a declaratory judgment declaring null and void a condemnation proceeding by the City of Wichita, Kansas, seeking to condemn a right of way for a water line across appellants' land to bring water to the city limits. The grounds on which Federal jurisdiction was invoked were that the condemnation proceedings and the statutes under which they were brought violated the due process clause

of the Fourteenth Amendment to the United States Constitution.[1] A motion was filed by the city to dismiss. The parties agreed that it should be treated as a motion for a summary judgment. After a hearing, the trial court sustained the motion and entered a summary judgment dismissing appellants' cause of action.

The record shows that on September 7, 1954, the City of Wichita began a series of steps necessary under Kansas Statutes[2] to condemn this right of way by enacting Ordinance No. 20-386 describing the lands to be taken. This ordinance was published the following evening in the Wichita Eagle, the official city paper and a daily newspaper of general circulation throughout Sedgwick County, of which county Wichita is the county seat. The following day the condemnation action was begun by the city in the District Court of Sedgwick County, Kansas, to take, among other parcels, the lands of the plaintiffs herein involved. As required by statute, the district judge appointed appraisers who caused to be published in the Wichita Eagle on September 16, 1954, a notice addressed to plaintiffs that their lands were being condemned. The lands to be taken were described therein as were the reason and the extent of taking, as follows: "for the purpose of laying, installing, maintaining and operating pipes, lines, mains, electric transmission control and communication circuits and other appurtenances necessary for the construction, extension and improvement of the water supply and water works system of the CITY OF WICHITA, KANSAS, for the purpose of supplying said city and its environs and inhabitants thereof with water." The notice informed plaintiffs that appraisers were to meet at the City Building in Wichita on September 27, 1954, at 10:30 A.M. to assess the damages to be awarded.

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[1] 28 U.S.C.A. § 1331.

[2] Gen. Stat. 1949 §§ 26-201-205.

The report of the commissioners was filed on September 28, 1954, and thereafter confirmed by the district court. Title and the right of exclusive possession to the easements and rights of way condemned were vested in the city and the damages approved by the appraisers were made available to landowners as provided by state law.

While numerous assignments of error are urged for for reversal, they fall generally into three classes and they will be so treated. They are: (1) the condemnation statutes and notice thereunder given to appellants were unconstitutional and void for lack of due process; (2) the condemnation ordinance was illegal because the pipeline right of way condemned was in reality for the private benefit of the Wichita Water Company rather than for an authorized public purpose; and (3) the petition in condemnation was so lacking in definiteness and certainty that the condemnation proceedings were, therefore, rendered void.

The most serious question in the case relates to the adequacy of the notice. One whose property is sought to be taken from him under the power of eminent domain is entitled to notice and to a hearing with respect to the value of the property sought to be so taken. Failure to give adequate notice would render such a proceeding void and constitute lack of due process under the Fourteenth Amendment.[3] Appellants complain that they were not personally served with notice of the meeting of the board of appraisers for the purpose of fixing damages. We are, however, of the view that they were not entitled to such notice and that adequate publica-

[3] See Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 313-14 (1950);
North Laramie Land Co. v. Hoffman, 268 U.S. 276, 283-84 (1925);
Huling v. Kaw Valley Railway & Improvement Co., 130 U.S. 559 (1889).

tion notice would be sufficient. While there is some authority to the contrary, the great weight of authority supports the proposition that a condemnation proceeding is a proceeding in rem and that constructive notice meets the requirement of due process.[4]

But appellants contend that in any event the statute under which this notice was given and the notice actually given thereunder are both void. G.S. 1949 § 26-202, relating to the condemnation of property within a city, provides that at least ten days' notice of the time and place where damages will be assessed shall be given in writing or "by one publication in the official city paper." It is clear from the record that the notice was given pursuant to this statute. The order of the district court directed that notice be given in the official city paper. Appellants argue that notice in the official city paper of condemnation with respect to the property lying outside the city is no notice. They argue that under such a law one who owns property in a number of counties lying outside of the city limits would have no notice unless he subscribed to all of the official city papers in those counties. This argument is not without substance, and were Section 26-202 the only provision dealing with notice in condemnation of property outside a city a grave question might arise as to the sufficiency of such notice or the validity of such statute.

The provision which gives a city power to condemn property either within or without the city limits is G.S. 1949 § 13-1209. Section 26-202 merely sets out the procedure to be followed in condemning property within the city limits. With respect to the procedure to be followed for condemning property outside the city limits we look to Section 26-208 which provides that, "Where the governing body of any city, or any other board or

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[4] See C.J.S., p. 1217 § 245 (b);
20 C.J., p. 938 § 349;
Georgia v. Chattanooga, 264 U.S. 472, 483 (1924).

commission of such city, is authorized to condemn land outside the city limits for use of such city, * * * the same proceedings shall be had as though such land were located within such city, *so far as the procedure relating to cities shall be applicable.*"[5]

So far as we have been able to ascertain Section 26-208 has never been considered by the Supreme Court with respect to what form of notice must be given thereunder. It seems clear to us that generally it requires city condemnation proceedings with respect to property outside the city to be carried on under the general provisions of the law relating to condemnation of property within the city. Thus, for the necessity of a city resolution finding a public need, the passage and publication of an ordinance, and the application to the district court for the appointment of appraisers, we must look to the statute relating to the condemnation of property within the city. In fact, only there can we find the procedural steps to be taken. But it also seems clear to us that the statute recognizes that in some respects the procedure relating to condemnations within the city may not be appropriate to condemnation of property outside the city. If that were not so, why was the phrase "so far as the procedure relating to cities shall be applicable" added? If every step must be taken under the regular city condemnation statute, then this phrase would be useless, meaningless and would add nothing to the statute.

Giving of notice in the official city paper with respect to property outside the city limits would seem one of the steps to which the regular condemnation procedure governing cities would not be applicable. In fact, that is the main argument urged by appellants for reversal.

It must be assumed that the statute authorizing cities to condemn property outside cities contemplates that

[5] Emphasis supplied.

all steps essential to a valid condemnation must be taken and, since the regular statute for cities with respect to notice would be inadequate, the legislature must have contemplated that an adequate notice would be given. We then look to the general statutory provisions for the condemnation of property generally. G. S. 1949 § 26-101 of the General Condemnation Statute, with respect to notice provides, "The appraisers so appointed shall give any owner, and all lienholders of record, of the property sought to be taken, at least ten days' notice in writing of the time and place, when and where the damage will be assessed and *by one publication in a newspaper of general circulation in the county where such property is situated.*"[6]

It is our view that with respect to notice Section 26-208 contemplates that when property outside the city is being condemned notice must be given in a paper in general circulation in the county in which the property is located. This view is strengthened by the enactment of Chapter 213 of the Session Laws of 1955 in which Section 26-208 was amended by specifically providing that notice with respect to condemnation of property lying outside the city should be given in a paper of general circulation in the county where the land is situated. While no legislative history is available, it is not unreasonable to assume that the legislature by this amendment intended to clarify the statutory provision with respect to notice for the condemnation of land outside the city, rather than to effect a change in the meaning and requirement of Section 26-208.

The notice given in this case met the test of Section 26-208 as it was before its amendment in 1955 because the Wichita Eagle in addition to being the official city paper of the City of Wichita also is a paper of general circulation throughout Sedgwick County, where appellants' land is located. The fact that the parties thought they were giving the notice pursuant to Section

[6]Emphasis supplied.

26-202 is immaterial. What they actually did is the important thing. They gave the notice in a paper of general circulation in the county and such notice was adequate.

The remaining question regarding notice is whether a ten day notice is adequate. The only requirement with respect to the length of notice is that it must be reasonable[7] Not many cases have considered a ten day notice. Those that have, habe held it to be adequate notice.[8] In Walker v. City of Hutchinson, 284 P. 2d 1073 (1955), involving condemnation of land within the City of Hutchinson, the Kansas Supreme Court upheld the ten day publication notice. In addition to the ten day notice of the appraisers' meeting, the landowner has an additional thirty days to apply for relief from the appraisement. It is our conclusion that the ten day publication notice is adequate and meets the requirement of due process.

It is next contended that the taking of appellants' land was not for a public use. This contention centers around the relationship between the City of Wichita and the Wichita Water Company, a private utility, which owns the distribution system within the city and actually distributes and sells the water. Appellants' contention is that because of the contract between the city and the water company with respect to the water to be conducted through this pipeline, providing that the city should conduct the water to the city's gate, and there deliver it to the water company to be distributed by it to the water users, the taking amounted to a condemnation for the

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[7] North Laramie Land Co. v. Hoffman, 268 U.S. 276 (1955).

[8] See Wynnebago Furniture Manufacturing Company v. Wisconsin Midland Railroad Company, 81 Wis. 389, 51 N.W. 576 (1892);
Pottock v. Mellott, 22 A. 2d 843 (Del. 1941);
Tilton v. Decker, 171 Cal. 731, 154 P. 960 (1916).

benefit of a private corporation. This precise question was presented and decided against appellants' contention in State ex rel. Brown v. Hedrick, 283 P. 2d 437. While that case is not res judicata because the parties are not the same, we think it correctly decided the issue and it expresses our views. The court there dealt at length and in great detail with the precise question and reference is made to the opinion of the court in support of our own conclusions. We think the taking was for a public use, namely, to make provision for the distribution of water to the city and its environs. The method adopted by the city for the accomplishment of this purpose when it reached the city limits did not affect the nature of the taking.

Finally, it is contended that the description of the estate in appellants' land which was to be taken is inadequate. It is well settled that a landowner is entitled to just compensation for his land. That is the universal law and requires no citation of authorities. Certainly a factor in the determination of the compensation to be awarded is an adequate description of the estate to be taken and the use to which the land is to be put. In support of their contention that the description is inadequate appellants quote from the city's answer in the state court action admitting that while the city planned to lay a 66 inch pipeline under appellants' land the construction plans were not and could not finally be determined at the time of the condemnation action. We are of the view that the description, however, is adequate. Obviously, every detail could not be set out. But the taking was described as "for the purpose of laying, installing, maintaining and operating pipes, lines, mains, electric transmission control and communication circuits and other appurtenances necessary for the construction, extension and improvement of the water supply and water works system of the CITY OF WICHITA, KANSAS." That description with the surrounding circumstances leaves no uncertainty as to the estate to be taken.

AFFIRMED.

APPENDIX D.

No. 39,721

STATE OF KANSAS, ex rel., Lelus B. Brown, County Attorney of Harvey County, Kansas, *Appellant*, v. Clay Hedrick, as county clerk of Harvey County, Kansas; The State Commission of Revenue and Taxation of the State of Kansas, and the City of Wichita, Kansas, *Appellees*, and The Board of County Commissioners of Harvey County, Kansas; Halstead Township of Harvey County, Kansas; Lakin Township of Harvey County, Kansas; Halstead Common School District No. 52 of Halstead, Kansas; Rural High School District No. 1 of Halstead, Kansas; Bentley Public School District No. 185, Joint, of Bentley, Kansas; and Valley Center Township of Sedgwick County, Kansas, *Appellants*.

SYLLABUS BY THE COURT

1.

The record examined in a proceeding in mandamus filed in the district court to compel the county clerk to assess for taxation certain property situated in his court, and *held*, that the motion for the alternative writ of mandamus and the alternative writ issued disclose that the property, consisting of water pipe lines, pumping equipment and other appurtenances, belongs to and is owned by a city of the first class, is used exclusively for conveying water to such city, and is exempt from taxation under the provisions of G.S. 1949, 79-201, *Seventh*.

2.

The record further examined, and *held*, that the trial court did not err in sustaining the city's motion to quash the plaintiff's motion for the alternative writ of mandamus and the alternative writ issued.

Appeal from Harvey District Court; ALFRED G. SCHROEDER, judge. Opinion filed May 7, 1955. Affirmed.

Kenneth G. Speir, of Newton, argued the cause, and *Lelus B. Brown,* County Attorney of Harvey County, Kansas, was with him on the brief for the appellants the State of Kansas and the Board of County Commissioners of Harvey County, Kansas.

J. Rodney Stone, of Newton, was on the brief for the appellants Halstead and Lakin Townships of Harvey County, Kansas; Halstead Common School District No. 52 and Rural High School District No. 1, of Halstead, Kansas; Bentley Public School District No. 185, Jt., of Bentley, Kansas; and Valley Center Township of Sedgwick, County, Kansas.

Arthur N. Turner, of Newton, argued the cause, and *Alden E. Branine,* and *C. Fred Ice,* both of Newton, were with him on the brief for the appellee Clay Hedrick, as County Clerk of Harvey County, Kansas.

DOUGLAS E. SHAY, of Wichita, argued the cause, and *Fred W. Aley,* of Wichita, was with him on the brief for appellee the City of Wichita.

The opinion of the court was delivered by

THIELE, J.: The state on the relation of the county attorney of Harvey county instituted a proceeding in the district court of that county to compel the county clerk to assess certain property, later mentioned, for taxation, and on the same day an alternative writ was issued. Thereafter the State Commission of Revenue and Taxation, the Board of County Commissioners of Harvey County and the city of Wichita and two townships were made defendants and other municipal corporations who would share in any tax levied, were permitted to intervene. The city of Wichita filed its motion to quash the motion for and the alternative writ of mandamus issued.

The trial court sustained the motion to quash, and the plaintiff, the Board of County Commissioners and the various municipal corporations other than the city of Wichita have appealed.

In view of the questions presented on the appeal, it is not necessary that all of the pleadings be reviewed.

In the motion for the writ filed April 19, 1954, the plaintiff alleged: 1. That Hedrick was the county clerk of Harvey county; 2. "That the City of Wichita, Kansas, has the legal title to certain water pipe lines, pumping equipment, and other appurtenances located in Harvey County, Kansas, but that the beneficial use thereof is in the Wichita Water Company, a private corporation organized for profit. That the City of Wichita, Kansas, purchased and installed said pipe line and other appurtenances located in Harvey County, Kansas, pursuant to a certain agreement with said Wichita Water Company, in connection with a certain franchise, that hereunto attached, marked 'Exhibit A,' is a true and correct copy of Ordinance No. 13-520, which sets forth the agreement or arrangement between said city and said water company."; 3. That under the constitution of the state of Kansas the pipe line and other appurtenances were not exempt from taxation but the defendant had failed to assess them for taxation; 4. That plaintiff had no adequate remedy at law and was entitled to a writ of mandamus directed to the county clerk requiring him to assess the above property for taxation. There was no description of the property other than as shown above.

The copy of the ordinance shows it was enacted November 22, 1942, and granted to The Wichita Water Company, hereafter referred to as the company, a franchise for the purpose of constructing, operating, extending and maintaining a system of waterworks in the city of Wichita for the purpose of supplying and distributing water to the city and the inhabitants thereof for domestic,

commercial, industrial and other uses as well as for the extinguishing of fires, and that the city, during the life of the franchise, should deliver to the company at a stated location an adequate supply of water for distribution except under conditions not of present importance and that the company should pay to the city stated rates for the water as well as other fixed charges.

On April 24, 1954, the county clerk filed his answer alleging that the records in his office disclosed that in the year 1941 a described five acres was entered upon the tax rolls as the property of the city of Wichita and was assessed for the years 1941 to 1945 inclusive and on July 6, 1946, the Commission of Revenue and Taxation of the state of Kansas issued an order abating the tax for the reason the property was exempt from taxation and subsequent thereto the propeprty was not again assessed; that he had not placed the property on the assessment rolls for the current year because of the above order and for the further reason the legal title to the property was in the city of Wichita, a city of the first class, and, under Art. XI, Sec. 1, of the state constitution and G.S. 1949, 13-1406 and 79-201, the property was exempt from taxation. Other allegations need not be set forth. He prayed the alternative writ be dismissed and he have judgment for costs.

On May 18, 1954, the trial court made its order that the city of Wichita and others be made parties defendant and on June 12, 1954, the city of Wichita filed its motion that the court quash the motion for the alternative writ and the alternative writ issued for reasons which need not be set out in detail but which included that the county clerk was commanded to perform acts beyond the power and scope of his duties, and that no facts were stated showing plaintiff had a clear legal right to require performance of the acts ordered done by the county clerk.

The trial court heard the motion to quash, and after having it under consideration for some time, on August 23, 1954, sustained the motion. In due time the plaintiff, the board of county commissioners and the municipal corporations other than the city of Wichita served notice of appeal.

In this court the appellants have filed a single abstract and a single brief.

Before taking up appellants' contentions of error we note that no defendant has raised any question of the venue of the action insofar as it is concerned. However, as bearing on the question, attention is directed to *Trader v. Southwestern Bell Telephone Co.*, 145 Kan. 600, 66 P. 2d 414, as to venue of actions against a city, and to *Huerter v. Hassig*, 175 Kan. 781, 267 P. 2d 532, as to actions against a state agency.

Appellants premise their argument by directing attention to Art. XI, Section 1, of our state constitution that all property *used exclusively* for municipal purposes shall be exempted from taxation, to G. S. 1949, 79-201, *Seventh*, that all works, machinery and fixtures belonging to any city and *used exclusively* for conveying water to such city shall be exempt from taxation, and to the Fourteenth amendment to the constitution of the United States that no state shall deprive any person of property without due process of law nor deny any person within its jurisdiction the equal protection of the law, and by stating the motion to quash is equivalent to a demurrer, citing *Citizens Utilities Co. v. City of Goodland*, 146 Kan. 172, 69 P. 2d 318, and therefore the motion to quash admits all of the allegations of the motion for the writ and the writ, citing *Zinn v. Hill Lumber & Investment Co.*, 176 Kan. 669, 272 P. 2d 1106. Appellants state that the admissions are that title is vested in the city; that the beneficial use is in the company, a private corporation for profit, and the property has not been assessed for taxation, and in another place in their brief, they state the admission is that the waterworks are used

exclusively for the purpose of conveying water to the company. It need not be debated but that a demurrer or other pleading equivalent thereto admits the well pleaded allegations of the pleading attacked for the purpose of determining the sufficiency of the pleading. While a pleading is usually to be liberally construed in favor of the pleader, the whole of it must be considered and where the pleader attaches to his pleading a written instrument on which his allegation rests, he cannot plead at variance with the terms of that instrument or not justified by it (*Wood v. Stewart*, 158 Kan. 729; 150 P. 2d 331). Applying the rule stated, the motion to quash did not admit the pleaded conclusion the beneficial use of the property was in the company and whether that be the case is to be determined from the ordinance and presents a question of law which will be considered later.

Appellants' contentions all are based on their assumption that beneficial use is in the company, and are presented under three general headings: 1. The property is not exempt by statute; 2. The property is not exempt under the constitution; and 3. The exemption violates constitutional provisions.

Preliminary to discussing the appellants' contentions it is noted that the city of Wichita bases its claim for exemption from taxation on two statutes, one pertaining to taxation and providing that all property belonging exclusively to any city shall be exempt from taxation (G.S. 1949, 70-201, *Sixth*), the other pertaining to cities of the first class and providing lands, buildings and other property of such city shall be exempt from taxation (G.S. 1949, 13-1406). Appellants contend that those statutes are unconstitutional in that they do not make the exemption depend upon exclusive use for a public purpose. If, however, the action be disposed of on appellants' contention the property is not exempt under the statute later mentioned and on which they rely, then the questions of constitutionality of the above mentioned statutes need not be discussed.

Appellants' first contention is that the only statute applicable is G. S. 1949, 79-201, *Seventh*, which provides for exemption from taxation of

> "All works, machinery and fixtures belonging to and owned by any town, city or village, and used exclusively for conveying water to such town, city or village."

and they argue that such statute deals specifically with the tax status of waterworks belonging to a city, and no other statute dealing generally with tax exemption applies, under the rule that where there is a conflict between a statute dealing generally with a subject and another dealing with a specific phase of it, the specific legislation controls, in support of which they cite *Moody v. Edmondson*, 176 Kan. 116, 269 P. 2d 462. They expand their argument by citing a number of our decisions holding that taxation is the rule, exemption is the exception, and that statutes granting an exemption are strictly construed and those claiming the exemption have the burden of showing clearly that the facts entitle them to the exemption. Those rules were recently restated and adhered to in *Runbeck v. Peterson*, 177 Kan. 314, 279 P. 2d 233, and the cases cited by appellants need not be reviewed.

In support of its contention that the statutes relied upon by it control, the city of Wichita cites *City of Harper v. Fink*, 148 Kan. 278, 80 P. 2d 1080, where application of G. S. 1949, 79-201, *Sixth*, and a counter part of G. S. 1949, 13-1406 being G. S. 1949, 14-1101, were involved and where it was held that under those statutes the test whether real estate belonging to a city was exempt from taxation was ownership and not use. That case, however, did not involve a situation where G. S. 1949, 79-201, *Seventh*, presently relied on by appellants, had application, and that case is not decisive of appellants' contention that the last mentioned statute controls.

In view of what is later said we need not enter into any discussion of the rule of construction as to general or special legislation. The appellants make no direct contention that the ordinance of the city of Wichita granting a water distributing franchise to the company is illegal or invalid, and when capacity of the present plaintiff to raise the question and the power of the Harvey County district court to decide it even though the water company was a party, and it is not, are considered, it is apparent such indirect contention as is made cannot be ruled on.

It is apparent from the ordinance granting the franchise to the company that the city obligates itself to furnish water at a designated place in Sedgwick County and that the company obligates itself to distribute the water to the city and its inhabitants for domestic, commercial and other uses as well as for the extinguishing of fires. There is nothing in the ordinance indicating from what source the city is to obtain water or that the company has any obligation to or any interest in or right to control any property of the city between the point of delivery of water to it and the place where the city of Wichita may obtain the water. It may not be said that the company has any beneficial interest in the works of the city beyond the point where the water is delivered to the company. For present purposes, we are of the opinion it is of no concern to the appellants how the city distributes the water which it obtains for its uses or whether it may do the same by its own distribution system, if it had or has one, or by contract with someone like the company, for the end result is to supply the city and its inhabitants with water, in itself a legal function under its governmental and police power.

By way of summary we conclude that the motion for the writ and the ordinance attached as a part thereof disclose that The Wichita Water Company had no beneficial interest in the property of the city of Wichita

located in Harvey county; that the property, works, machinery and fixtures belonging to the city for conveying water to such city, were used exclusively for that purpose; that under G. S. 1949, 79-201, *Seventh*, such property was exempt from taxation and that the trial court did not err in rendering judgment quashing the motion for the alternative writ of mandamus to compel the county clerk of Harvey county to assess the property for taxation and the alternative writ issued.

The judgment of the trial court is affirmed.

No. 39,782

LEE WALKER, *Appellant*, v. CITY OF HUTCHINSON, RENO COUNTY, KANSAS, a municipal corporation; T. E. CHENOWETH, City Manager of said City; ROBERT G. KING, Mayor and Member of the City Commission of said City; CHARLES N. BROWN, JERRY STRIMEL, R. C. WOODWARD and C. E. JOHNSON, Members of the City Commission of said City, *Appellees*.

SYLLABUS BY THE COURT

In an action to enjoin a city from entering upon real estate taken by it under a proceeding in eminent domain, the record is examined, and it is *held*, that G. S. 1949, 26-202, which provides that the commissioners appointed by the judge of the district court shall give any owner of the property sought to be taken ten days' notice by publication in the official city paper that at the time fixed by such notice the commissioners will appraise the value of the lands taken and assess the other damages done to the owners of such property, does not deprive such owner of due process of law and is not unconstitutional.

Appeal from Reno district court; JOHN FONTRON, judge. Opinion filed June 11, 1955. Affirmed.

A. Lewis Oswald, of Hutchinson, argued the cause, and *William L. Mitchell* and *Patrick H. Thiessen*, both of Hutchinson, were with him on the brief for the appellant.

Fred C. Littooy, City Attorney of Hutchinson, argued the cause, and *Bill R. Cole*, Assistant City Attorney of Hutchinson, was with him on the brief for appellees.

The opinion of the court was delivered by

THIELE, J.: This was an action in which the plaintiff Lee Walker sought an injunction against the defendant city to prevent an alleged trespass on his real estate. The relief sought was denied by the trial court and plaintiff has appealed.

Insofar as need be noticed plaintiff alleged that he owned certain described real estate in the city of Hutchinson and that on April 12, 1954, the city, by its officials, commenced proceedings in the district court to condemn property for the acquisition of right-of-way for opening, widening and extending portions of named streets in the city; that plaintiff had never been notified in any manner that the city desired his real estate nor had he ever been served with summons nor given any personal notice that the city had filed the proceeding for the purpose of taking a part of his real estate; that the pretended right of the city to take the real estate owned by the plaintiff rested upon the authority of G. S. 1949, 26-201 and 26-202, which statutes are void and of no force because they attempt to vest the power in the city to take property without due process of law; that the only notice to an owner of real estate, under those statutes, is by publication and is not sufficient under the due process clauses of the United States constitution and the state constitution; that plaintiff had no actual notice or any reason to know the city sought to condemn and take his real estate until the middle of August, 1954, unless it can be said the single legal publication, published once in a named newspaper gave him notice, and that such

single published notice was not sufficient to satisfy the requirements of the due process clauses of the above constitutions. It was further alleged that the city was entering upon plaintiff's real estate for the purpose of building a highway across it, all in disregard of plaintiff's rights and that he was entitled to an order enjoining the city from so doing, and he prayed accordingly.

The gist of the defendant's answer was that the city was proceeding under the above statutes, and that it instituted proceedings in eminent domain and that the commissioners appointed by the judge of the district court gave notice by publication in the manner prescribed by G. S. 1949, 26-202 which notice specifically named the plaintiff, described the portion of his real estate being condemned for a public street and which notice was published more than ten days prior to April 27, 1954, the date set forth in the notice for the meeting of the commissioners for assessment of damages and appraisal of the lands taken; that the notice by publication and the procedure followed was authorized by the above statutes and was legal and valid. Attached to the answer was a copy of the notice published in the Hutchinson News-Herald, the official city paper, on April 14, 1954, which shows that notice of condemnation was given to Lee Walker and others that an application had been made requesting the district judge of Reno county to appoint commissioners to make an appraisement of lands taken under and by virtue of G. S. 1949, Ch. 26, Art. 2, and describing fourteen tracts of land in the city and that the judge had appointed three commissioners who would meet at a specified place on April 27, 1954, then and there to commence and proceed with the duties imposed upon them by law.

The plaintiff's reply admitted the material facts pleaded and denied the legal conclusion that the mentioned statutes did not violate constitutional provisions as to due process.

Details of the trial need not be noted. The trial court prepared a memorandum decision which covered rather fully the questions of constitutionality. The journal entry of judgment discloses the trial court heard the evidence, examined the pleadings and briefs filed and on November 1, 1954, found that G. S. 1949, 26-202 was constitutional; that the city of Hutchinson acted pursuant to it; that plaintiff had not been deprived of his property without due process of law and it denied plaintiff the relief for which he prayed and rendered judgment for the defendants.

The plaintiff perfected his appeal specifying as error that the trial court erred in holding G. S. 1949, 26-202 constitutional and in denying the injunction sought.

The question of constitutionality turns on the first sentence of the last mentioned statute, which reads:

> "The commissioners appointed by the judge of the district court shall give any owner and any lienholder of record of the property sought to be taken at least ten days' notice in writing of the time and place when and where the damage will be assessed, or by one publication in the official city paper, and at the time fixed by such notice shall, upon actual view, appraise the value of the lands taken and assess the other damages done to the owners of such property, respectively, by such appropriations."

For purposes of information we note the above statute was amended by the legislature in 1955 by the enactment of Senate Bill No. 313.

In his brief the appellant first directs attention to and quotes from 12 Am. Jur. 267, where it is stated that the elements of due process of law are notice, and an opportunity to be heard and to defend; that it is a rule as old as the law that no one shall be personally bound until he has been duly cited to appear and has been afforded an opportunity to be heard, and that a

judgment without such citation and opportunity lacks all the attributes of a judicial determination and is never to be upheld. Appellant then directs attention to the statute as quoted above and to the fact that it provides two methods for giving notice, one by at least ten days' notice in writing, the other by one publication in the official city paper, and he contends that the first method is fair and the second method unfair. It is here pointed out that he does not contend that if the second method was proper, what was done by the city did not fully meet the statutory requirement. In expanding his argument appellant stresses his age, his education and the length of time he had owned his real estate; that the three branches of the government, executive, legislative and judicial, have a duty to uphold the constitution and that it may not be amiss to consider how such an unconstitutional act was ever made part of the statutes; that in fairness the city should have given him personal notice and should not have followed the provision for publication notice; that the statute provided a right way and a wrong way and the "wrong way" violated his constitutional rights to due process. There is no specific argument that a statute providing for notice by publication in a proceeding to condemn lands in the exercise of the right of eminent domain is unconstitutional as depriving the owner of due process of law, and except for the reference to 12 Am. Jur. 267, there is no citation of any authority in support of the argument made. In such a case we might follow the rule that where, in connection with a contention of error by the trial court, no citation is made of authorities in support, this court may well conclude that counsel, after diligent search, has not been able to find any, and affirm the judgment. (*McCoy v. Fleming*, 153 Kan. 780, 113 P. 2d 1074)

In our opinion, however, the trial court did not err. In view of the question presented we need pay no attention to the provision for personal service, for none was

had. The question is whether a statute which provides for publication service of notice, as was had, deprives the owner of real estate of his property without due process of law.

Our approach to the problem of constitutionality, or lack of it, is governed by the oft recognized rule that all presumptions are that the statute is constitutionally valid and before the court can declare it invalid it must clearly appear to be unconstitutional. (See *Hartman v. State Commission of Revenue and Taxation*, 164 Kan. 67, 70, 187 P. 2d 939; *Miller v. Jackson*, 166 Kan. 141, 143, 199 P. 2d 513; *Board of Education of School Dist. No. 1 v. Robb*, 168 Kan. 368, 369, 212 P. 2d 306, and cases cited therein.) We also bear in mind that the general rule is that proceedings to exercise the right of eminent domain are in rem and not in personam (29 C. J. S. 1129, 18 Am. Jur. 738, McQuillin on Municipal Corporations, Vol. II, pg. 531, and *Todd v. Atchison, T. & S. F. Rly. Co.*, 134 Kan. 459, 7 P. 2d 79, and cases cited.)

Although stated in varying language, in many of the texts and encyclopedias treating of notice in condemnation proceedings the rule almost universally followed is that where the statute does not preclude its application, notice by publication is sufficient and satisfies the constitutional requirement, even with respect to persons residing within the jurisdiction where the proceedings are pending. See Lewis on Eminent Domain, Third Edition, pg. 1010, §568; Randolph on Eminent Domain, pg. 306, §337; Nichols on Eminent Domain, Vol. I, pg. 339; McQuillin on Municipal Corporations, Vol. II, pg. 549; 18 Am. Jur. pg. 967; and 29 C. J. S. pg. 1217.

In Merrill on Notice, Vol. 1, pg. 510, §518 (published in 1952) it is said:

> "Assuming notification to be necessary, there is much liberality in the decisions as to the methods which, consistently with due process, may be employed. Save in isolated instances which hardly serve

to mark exceptions to the general rule, personal notification is not regarded as an essential element of the 'law of the land,' unless a personal liability is to be enforced against one not otherwise subject to the 'jurisdiction'. The hallowing effect of time seems the chief factor in judicial willingness to accede to the employment of methods which can be regarded as likely actually to result in knowledge only upon the assumption that the notice, exercising the highest degree of care to determine whether any monition has been given, will carry his search into the highways and byways. Another factor, no doubt, is the expedition of public business resultant upon sustaining such arrangements.

"Thus it comes about that public posting, eminently inefficient as a source of information under modern conditions, is accepted as consistent with due process of law in drainage, paving, and irrigation proceedings. Publication, a whit more dependable, but still a very precarious way of spreading the news, has received judicial approval in numerous instances, including: special assessment proceedings; proceedings to organize irrigation or drainage districts; the assessment, equalization, and enforcement of taxes; eminent domain proceedings; land registration proceedings; and the process of administrative tribunals. The place of printing the newspaper in which a notice affecting realty is published has been held immaterial, the important thing being publication within the locality wherein the land affected lies. Publication within the limits of the principal city in a water district has been adjudged due process as to owners of land outside the city limits but within the boundaries of the district.

"Naturally combinations such as posting and publishing, or mailing and publishing, or a choice between either of two constitutionally permissible notifications, as posting or publishing, will pass muster."

In *Winnebago Furniture Mfg. Co. vs. The Wisconsin Midland R. Co.*, 81 Wis. 389, 51 N. W. 576, the court considered the sufficiency of a notice arising under a statute similar to ours and held, in part, that:

> " . . . The statute provides that notice 'may be served personally or at the last and usual abode of such owners and parties interested, not less than five days before such hearing, or by publication in some newspaper to be designated by said court or judge, not less than ten days before the date fixed for the hearing of such petition.' The statute undoubtedly gives the petitioner the right to give notice in either of the methods specified, and by publication on resident as well as nonresident owners, in case the court or a judge thereof shall so provide in the order. There is no constitutional requirement that we are aware of which prevents notice from being given by publication. . . . " (l.c. 394)

Georgia v. Chattanooga, 264 U. S. 472, 44 S. Ct. 369, 68 L. Ed. 796, involved condemnation of lands for railroad purposes. The facts need not be detailed. In the course of the opinion it was said the taking was a legislative and not a judicial function and an opportunity to be heard in advance need not be given, and further, that personal service on the owner was not essential; that publication of notice was sufficient.

In *North Laramie Land Co. v. Hoffman*, 268 U. S. 276, 45 S. Ct. 491, 69 L. Ed. 953, the court considered an appeal from the judgment of the Supreme Court of Wyoming upholding a condemnation for road purposes. In disposing of the contention that the statute and proceedings under it amounted to a denial of due process of law, the court said:

> "All persons are charged with knowledge of the provisions of statutes and must take note of the procedure adopted by them; and when that procedure is not unreasonable or arbitrary there are no con-

stitutional limitations relieving them from conforming to it. This is especially the case with respect to those statutes relating to the taxation or condemnation of land. Such statutes are universally in force and are general in their application, facts of which the land owner must take account in providing for the management of his property and safeguarding his interest in it. Owners of real estate may so order their affairs that they may be informed of tax or condemnation proceedings of which there is published notice, and the law may be framed in recognition of that fact. In consequence, it has been uniformly held that statutes providing for taxation or condemnation of land may adopt a procedure summary in character, and that notice of such proceedings may be indirect, provided only that the period of notice of the initiation of proceedings and the method of giving it are reasonably adapted to the nature of the proceedings and their subject matter and afford to the property owner reasonable opportunity at some stage of the proceedings to protect his property from an arbitrary or unjust appropriation. *Huling v. Kaw Valley Railway & Improvement Co.*, 130 U. S. 559; *Ballard v. Hunter*, 204 U. S. 241, at p. 262." (l.c. 283)

With respect to notice by publication, after stating the facts and the requirements of the statute, the court said further:

" . . . These requirements in all material respects are identical with those passed upon by this Court in *Huling v. Kaw Valley Railway & Improvement Co., supra*, in which it was held that a statute of Kansas providing that the condemnation of land for use for railroad purposes might be effected on thirty days' notice by publication in a newspaper, satisfied all the requirements of due process of law." (l.c. 285)

Appellees direct our attention to *Harrison v. Newman*, 71 Kan. 324, 80 Pac. 599. In that case the question was whether one statute requiring personal notice or another providing for notice by publication controlled. This court held the latter statute controlled and that notice thereunder was properly given. No question of constitutionality was involved and the case cannot be said to be decisive here.

No opinion of this court on the precise question of constitutionality of the statute in question has been cited in the briefs, nor does our limited search disclose any, but by the great weight of authority the answer must be that the statute under consideration did not deprive the appellant of due process of law and that the trial court did not err in holding that G. S. 1949, 26-202 was not unconstitutional for any reason asserted by the appellant, and accordingly

The judgment of the trial court is affirmed.

FILED
OCT 24 1955
HAROLD B. WILLEY, Clerk

No. 392

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1955

L. C. COLLINS AND LUCILLE COLLINS, HIS WIFE;
EARL SCHNEIDER AND MILDRED SCHNEIDER, HIS WIFE;
VOLLIE L. WOODWARD AND LELA E. WOODWARD, HIS WIFE;
LEO R. MARLATT AND LEWIS C. MARLATT,
PETITIONERS,

vs.

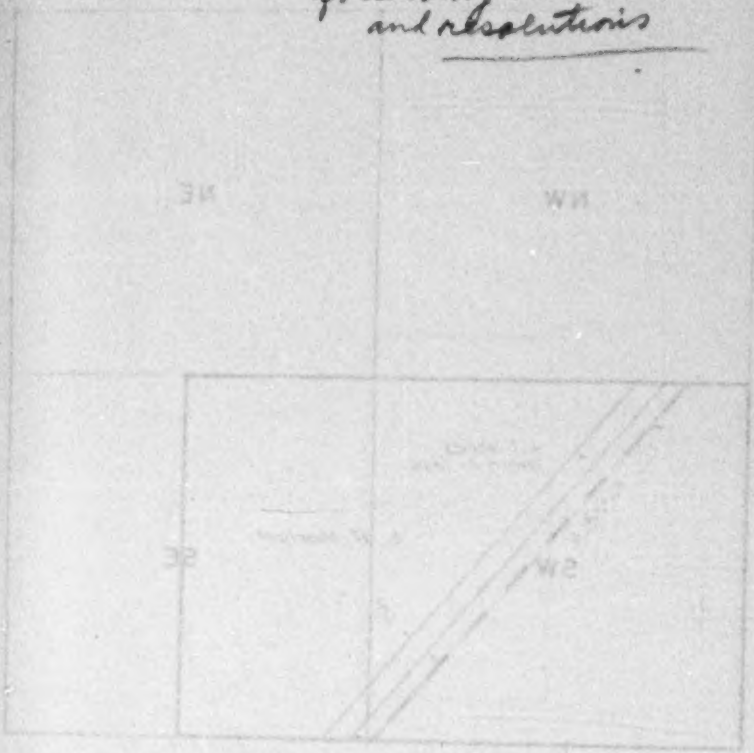
THE CITY OF WICHITA, KANSAS,
A MUNICIPAL CORPORATION,
RESPONDENT.

SUPPLEMENTAL EXHIBIT TO PETITION FOR WRIT OF CERTIORARI.

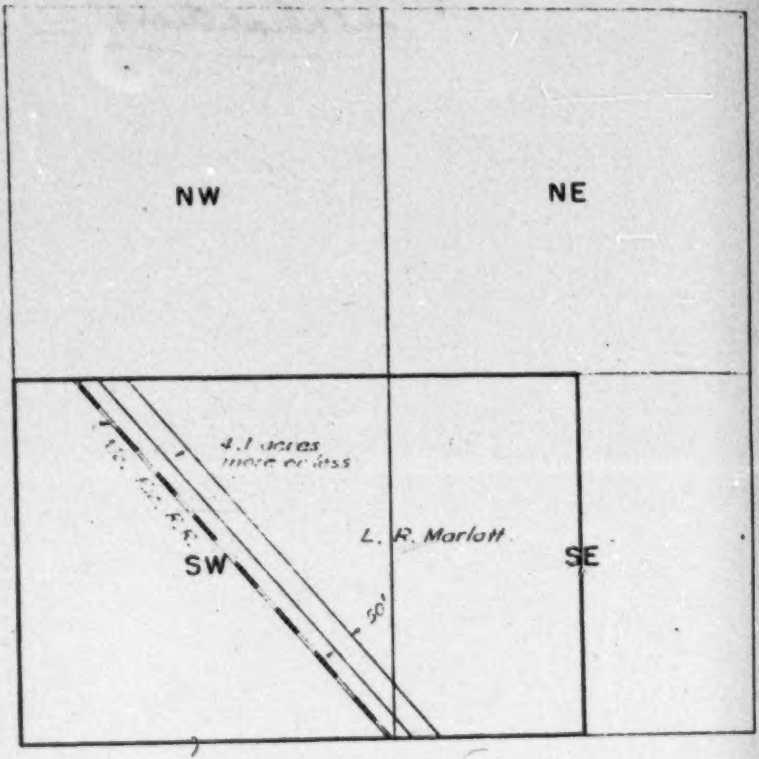
KENNETH G. SPEIR,
VERNON A. STROBERG,
HERBERT H. SIZEMORE,
Suite 4, Hanlin Building,
Newton, Kansas,
Counsel for Petitioners.

KANSAS LAW PUB. CO., TOPEKA

See note
following blue sheet
and resolutions

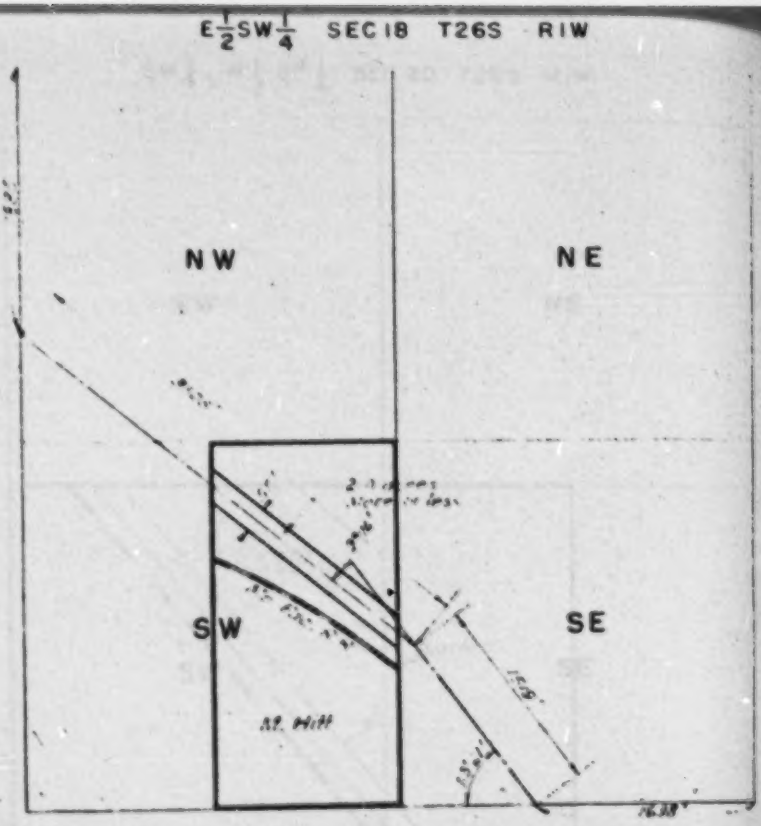


SW 1/4, W 1/2 SE 1/4 SEC 20 T26S R1W



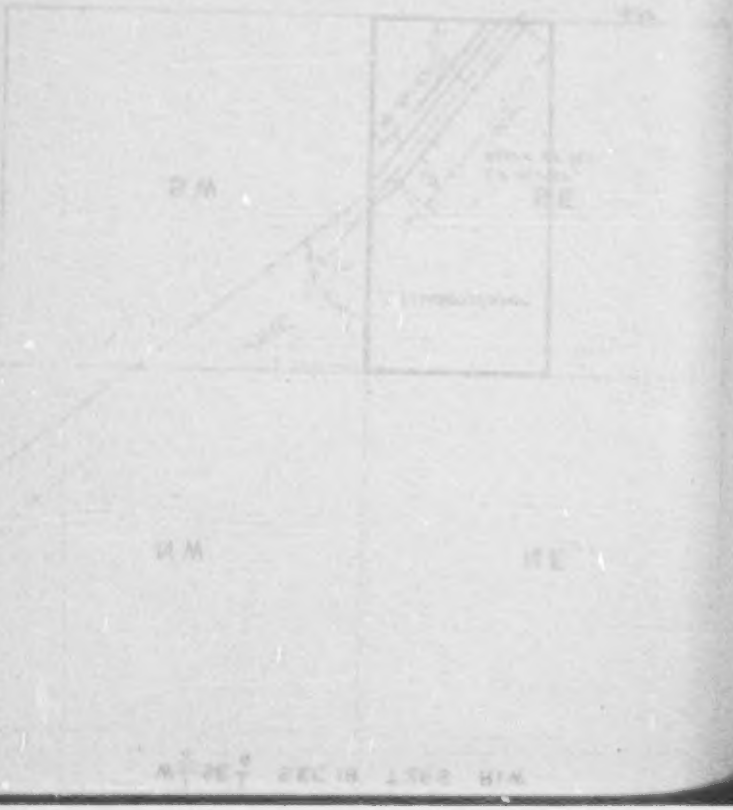
A strip of land 50 feet wide for permanent R/W, on the west side of and parallel and adjacent to the existing Missouri Pacific R/W, containing 4.1 acres more or less.

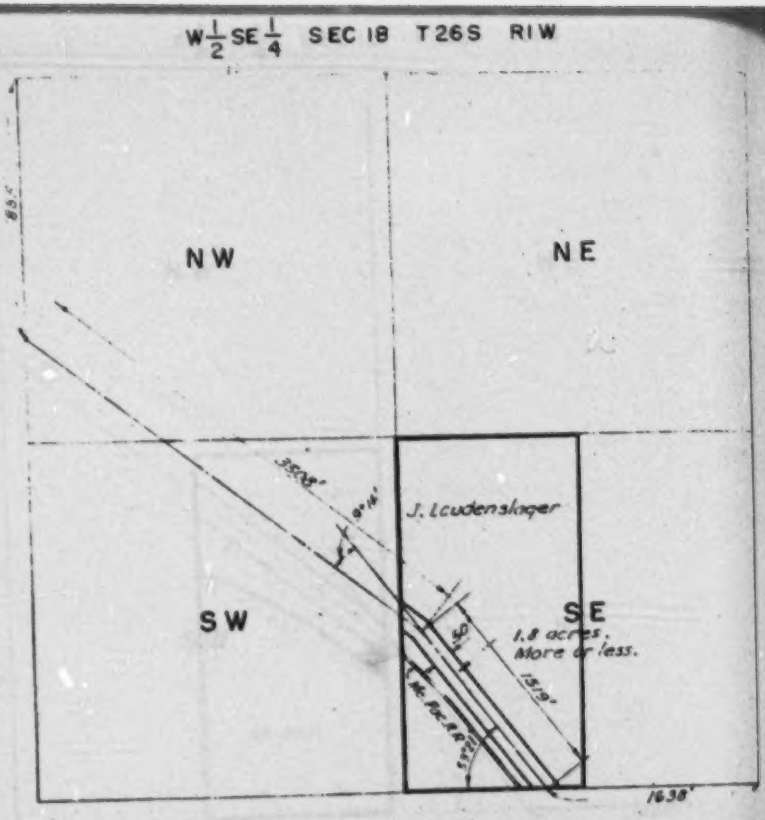
In addition, a strip of land 50 feet wide for temporary R/W, adjacent to and on the west side of the above described strip of land containing 2.0 acres more or less.



A strip of land 75 feet wide within the boundaries of the S 1/2 SW 1/4 Sec 18 T 26 S R1W for permanent R/W, including 25 feet on each side of the following described centerline: beginning at a point 1,240 feet more or less west of the southeast corner of Sec 18 T26S R1W, thence northeasterly on the west side and parallel to the temporary portion of the existing Missouri Pacific Railroad R/W 1,240 feet more or less, to a point 250 feet more or less west and 1,240 feet more or less north of the point of beginning, thence northwesterly 1,540 feet more or less at an angle of 51°40' more or less to the left to a point 1,800 feet more or less south of the northwest corner of Sec 18 T26S R1W; the strip of land within the S 1/2 SW 1/4 Sec 18 T26S R1W containing 1.00 acres more or less.

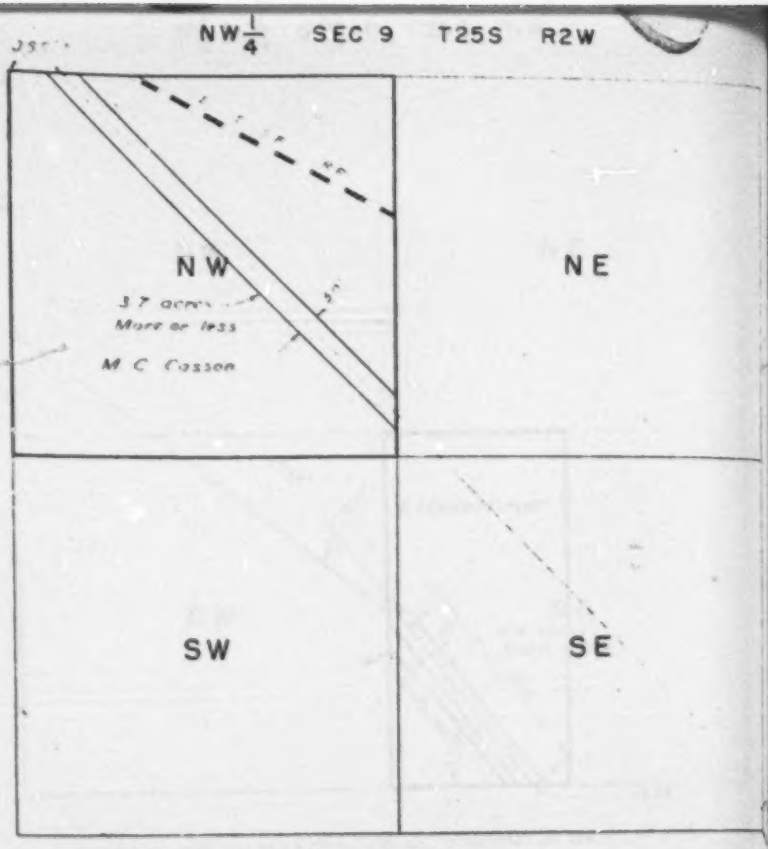
In addition, strips of land 75 feet wide for temporary R/W, as shown traced on each side of the above described strip of land; containing 2.00 acres more or less.





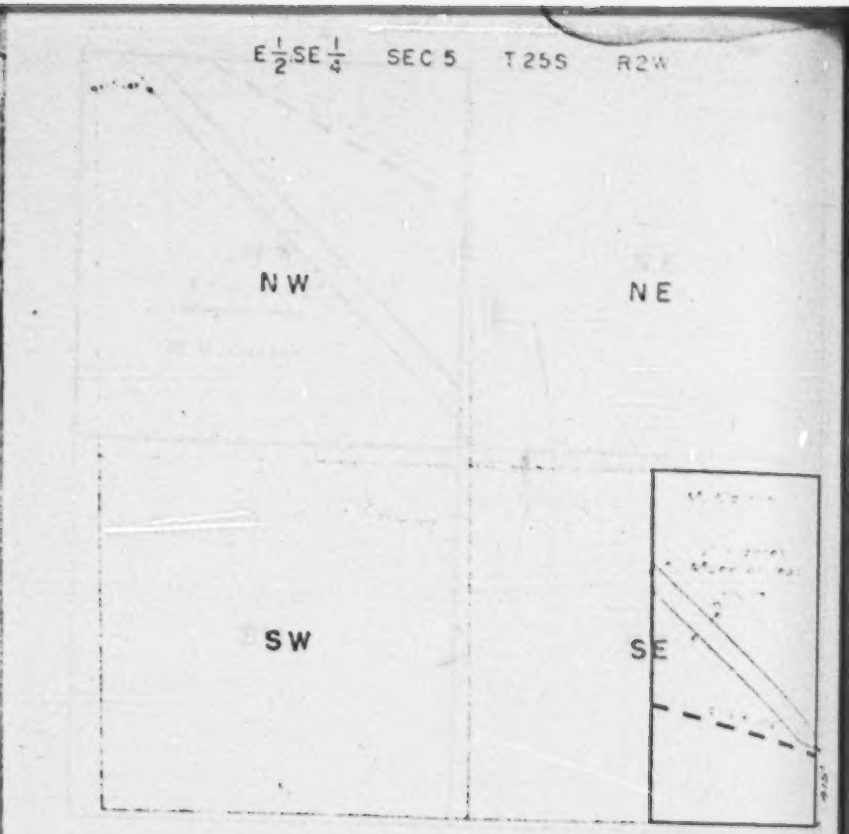
A strip of land [illegible] feet wide within the boundaries of the W 1/2 SE 1/4 Sec 18 T26S R1W for permanent R/W, including 25 feet on each side of the following described centerline: Begin at a point 1040 feet more or less west of the southeast corner of Sec 18 T26 S R1W, thence northwesterly on the east side of and parallel to the tangent portion of the existing Missouri Pacific Railroad R/W and so located that the west boundary of the R/W adjoins the east boundary of the tangent portion of the railway R/W, 1320 feet more or less, to a point 750 feet more or less west and 1210 feet more or less north of the point of beginning, thence northeasterly 1400 feet more or less at an angle of [illegible] more or less to the left to a point 1635 feet more or less south of the northwest corner of Sec 18 T26 S R1W; the strip of land within the W 1/2 SE 1/4 Sec 18 T26S R1W containing 1.8 acres more or less.

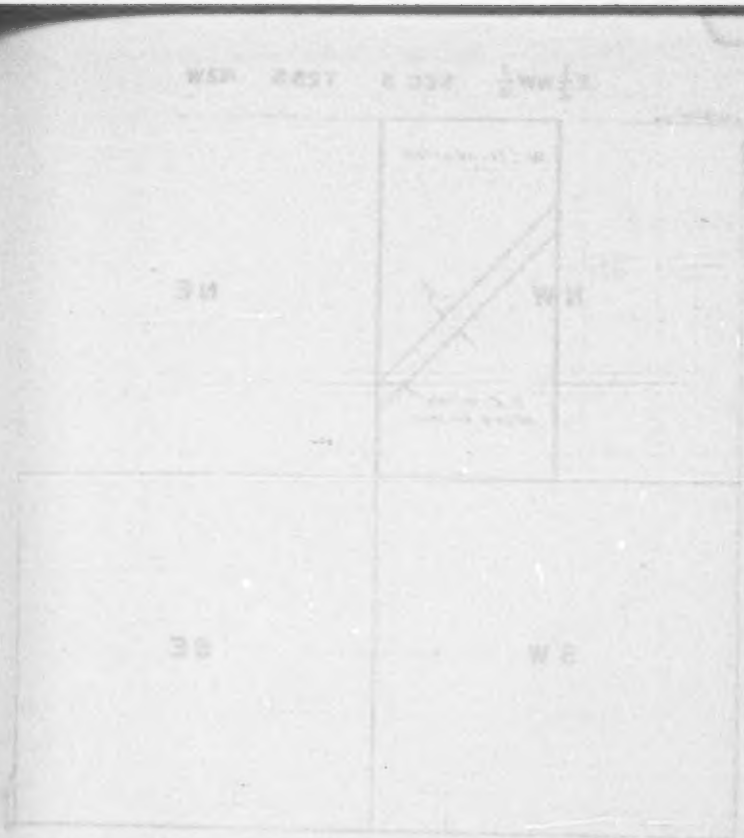
In addition, a strip of land [illegible] feet wide for temporary R/W adjacent to and on the east side of the above described strip of land; containing [illegible] acres more or less.

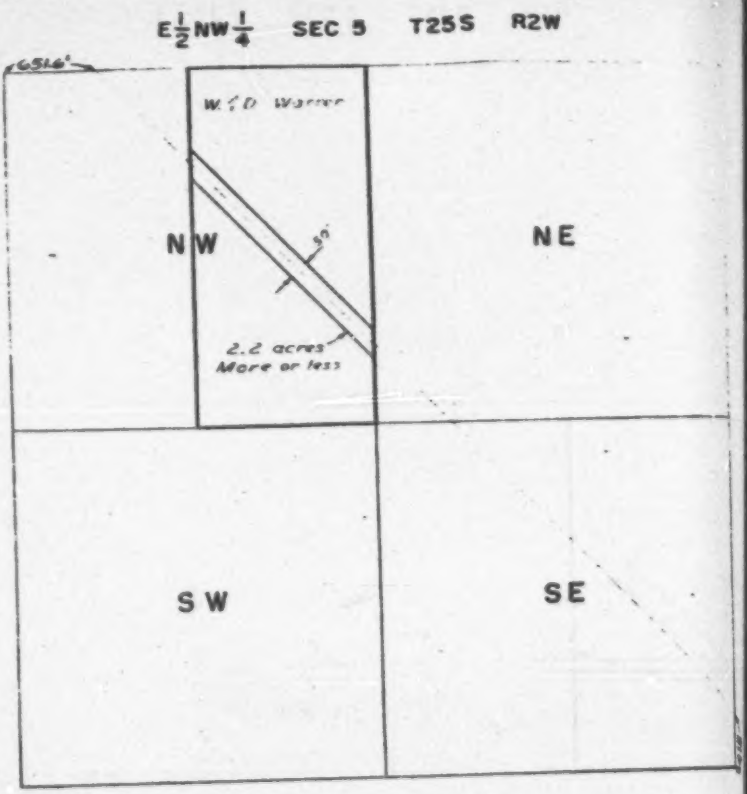


A strip of land 50 feet wide within the boundaries of the NW 1/4 Sec 9 T25S R2W for permanent R/W, including 25 feet on each side of the following described centerline: begin at a point 1¾ feet more or less north of the southeast corner of Sec 9 T25S R2W, thence northwesterly to a point 40 feet more or less east of the northwest corner of Sec 9 T25S R2W; the strip of land within the boundaries of the NW 1/4 Sec 9 T 25S R2W containing 3.7 acres more or less.

In addition, strips of land 25 feet wide for temporary R/W adjacent to and on each side of the above described strip of land; containing 3.7 acres more or less.


E½SE¼ SEC 5 T25S R2W
NW
NE
SW
SE

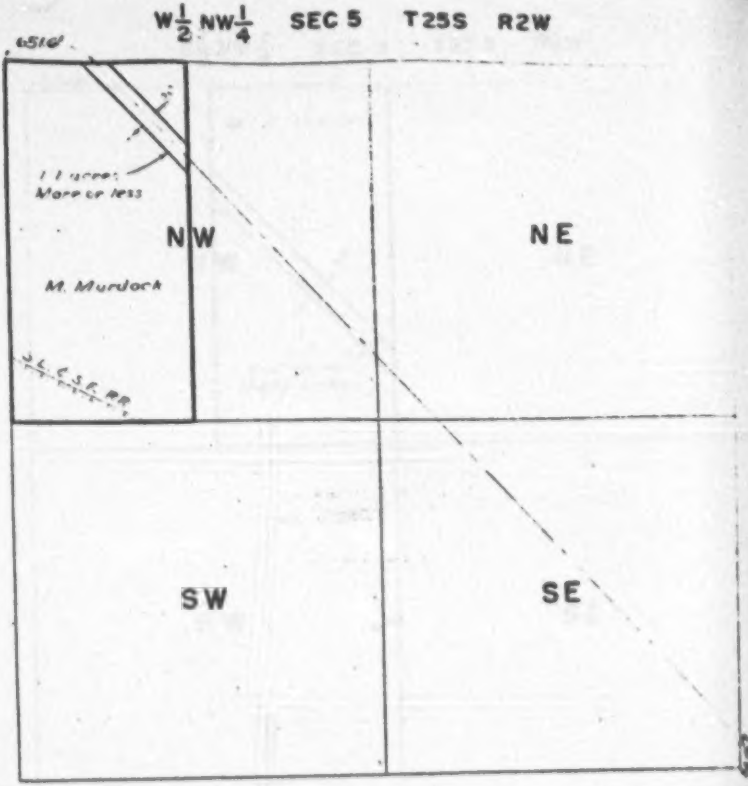




E 1/2 NW 1/4 SEC 5 T25S R2W

A strip of land 50 feet wide within the boundaries of the E 1/2 NW 1/4 Sec 5 T25S R2W for permanent R/W, including 25 feet on each side of the following described centerline: begin at a point 415 feet more or less north of the southeast corner of Sec 5 T25S R2W, thence northwesterly to a point 1314 feet more or less east of the northwest corner of Sec 5 T25S R2W; the strip of land within the E 1/2 NW 1/4 Sec 5 T25S R2W containing 2.2 acres more or less.

In addition, strips of land 25 feet wide for temporary R/W adjacent to and on each side of the above described strip of land; containing 2.2 acres more or less.



W 1/2 NW 1/4 SEC 5 T25S R2W

A strip of land 50 feet wide within the boundaries of the W 1/2 NW 1/4 Sec 5 T25S R2W for permanent R/W, including 25 feet on each side of the 1.1 wire described centerline: begin at a point 815 feet more or less north of the southeast corner of Sec 5 T25S R2W, thence northwesterly to a point 1150 feet more or less east of the northwest corner of Sec 5 T25S R2W: the strip of land within the W 1/2 NW 1/4 Sec 5 T25S R2W containing 1.1 acres more or less.

In addition, strips of land 25 feet wide for temporary R/W adjacent to and on each side of the above described strip of land; containing 1.1 acres more or less.

SECTION 2. After the filing of said survey and the report in the office of the City Clerk, that the City Attorney be and he is hereby directed to cause a proper ordinance to be prepared and submitted to the Board of Commissioners of the City of Wichita, Kansas, providing for appropriate proceedings relating to the taking of said easements or rights-of-way over the land in question.

SECTION 3. This resolution shall take effect and be in force from and after its passage and publication once in the official city paper.

ADOPTED at Wichita, Kansas, this 17th day of August, 1954

Wm. C. Salome
Mayor

ATTEST: C. A. Ellis
City Clerk

(SEAL)

1-t

(602) Published in the Wichita Eagle, Evening, on August 18, 1954

RESOLUTION

A RESOLUTION DECLARING IT NECESSARY TO ACQUIRE BY APPROPRIATE PROCEEDINGS IN EMINENT DOMAIN, EASEMENTS OR RIGHTS-OF-WAY IN, ON, OVER AND TO CERTAIN PRIVATE PROPERTY FOR THE PURPOSE OF LAYING, INSTALLING, MAINTAINING AND OPERATING PIPES, LINES, MAINS, ELECTRIC TRANSMISSION, CONTROL AND COMMUNICATION CIRCUITS, AND OTHER APPURTENANCES NECESSARY FOR THE CONSTRUCTION, EXTENSION, AND IMPROVEMENT OF THE WATER SUPPLY SYSTEM AND WATER WORKS SYSTEM OF THE CITY OF WICHITA, KANSAS, FOR THE PURPOSE OF SUPPLYING SAID CITY AND ITS ENVIRONS AND INHABITANTS THEREOF WITH WATER; DIRECTING THE CITY ENGINEER AND THE CONSULTING ENGINEERS, BLACK AND VEATCH, ALREADY EMPLOYED IN CONNECTION WITH SAID ENGINEERING PROJECTS, TO CAUSE A SURVEY TO BE MADE OF THE LANDS OVER WHICH SUCH EASEMENTS OR RIGHTS-OF-WAY WILL BE REQUIRED FOR SUCH IMPROVEMENT, SUCH SURVEY TO BE FILED IN THE OFFICE OF THE CITY CLERK OF THE CITY OF WICHITA; AND DIRECTING THE CITY ATTORNEY, AFTER THE FILING OF SAID SURVEY IN THE OFFICE OF THE CITY CLERK, TO CAUSE A PROPER ORDINANCE TO BE PREPARED AND SUBMITTED TO THE BOARD OF COMMISSIONERS OF THE CITY OF WICHITA PROVIDING FOR APPROPRIATE PROCEEDINGS IN EMINENT DOMAIN RELATING TO THE ACQUISITION OF SAID EASEMENTS OR RIGHTS-OF-WAY.

BE IT RESOLVED BY THE BOARD OF COMMISSIONERS OF THE CITY OF WICHITA, KANSAS:

SECTION 1. That it is hereby declared necessary to acquire by appropriate proceedings in eminent domain easements or rights-of-way in, on, over and to certain private property for the purpose of laying, installing, maintaining and operating pipes, lines, mains, electric transmission, control and communication circuits, and other appurtenances necessary for construction, extension and improvement of the water supply system and water works system of the City of Wichita, Kansas, for the purpose of supplying said City and its environs and inhabitants thereof with water; and the City Engineer and Black & Veatch, Consulting Engineers, already employed in connection with said engineering project, are hereby directed and instructed to cause to be prepared and to make a survey of the lands in, on, over and to which easements or rights-of-way shall be necessary for said purpose and to prepare a certificate showing the result of said survey over their signatures, and cause the same to to be filed in the Office of the City Clerk at Wichita, Kansas, said reports of said engineers shall contain a description of the lands in, on, over and to which easements or rights-of-way are necessary for such purposes.

RESOLUTION

A RESOLUTION DECLARING IT NECESSARY TO ACQUIRE BY APPROPRIATE PROCEEDINGS IN EMINENT DOMAIN EASEMENTS OR RIGHTS-OF-WAY IN, ON, OVER AND TO CERTAIN PRIVATE PROPERTY FOR THE PURPOSE OF LAYING, INSTALLING, MAINTAINING AND OPERATING PIPES, LINES, MAINS, ELECTRIC TRANSMISSION, CONTROL AND COMMUNICATION CIRCUITS, AND OTHER APPURTENANCES NECESSARY FOR THE CONSTRUCTION, EXTENSION AND IMPROVEMENT OF THE WATER SUPPLY SYSTEM AND WATER WORKS SYSTEM OF THE CITY OF WICHITA, KANSAS; DIRECTING THE CITY ENGINEER AND THE CONSULTING ENGINEERS, BLACK & VEATCH, ALREADY EMPLOYED IN CONNECTION WITH SAID ENGINEERING PROJECT, TO CAUSE A SURVEY TO BE MADE OF THE LANDS OVER WHICH SUCH EASEMENTS OR RIGHTS-OF-WAY WILL BE REQUIRED FOR SUCH IMPROVEMENT, SUCH SURVEY TO BE FILED IN THE OFFICE OF THE CITY CLERK OF THE CITY OF WICHITA; AND DIRECTING THE CITY ATTORNEY, AFTER THE FILING OF SAID SURVEY IN THE OFFICE OF THE CITY CLERK, TO CAUSE A PROPER ORDINANCE TO BE PREPARED AND SUBMITTED TO THE BOARD OF COMMISSIONERS OF THE CITY OF WICHITA PROVIDING FOR APPROPRIATE PROCEEDINGS IN EMINENT DOMAIN RELATING TO THE ACQUISITION OF SAID EASEMENTS OR RIGHTS-OF-WAY.

BE IT RESOLVED BY THE BOARD OF COMMISSIONERS OF THE CITY OF WICHITA, KANSAS:

SECTION 1. That it appears necessary to acquire by appropriate proceedings in eminent domain easements or rights-of-way in, on, over and to certain private property for the purpose of laying, installing, maintaining and operating pipes, lines, mains, electric transmission, control and communication circuits, and other appurtenances necessary for construction, extension and improvement of the water supply system and water works system of the City of Wichita, Kansas, and the City Engineer and Black & Veatch, Consulting Engineers, already employed in connection with said engineering project, are hereby directed and instructed to cause to be prepared and to make a survey of the lands in, on, over and to which easements or rights-of-way shall be necessary for said purpose and to prepare a certificate showing the result of said survey over their signatures, and cause the same to be filed in the Office of the City Clerk at Wichita, Kansas, said reports of said engineers shall contain a description of the lands over which easements or rights-of-way are necessary for such purposes.

SECTION 2. After the filing of said survey and the report in the office of the City Clerk, that the City Attorney be and he is hereby directed to cause a proper ordinance to be prepared and submitted to the Board of Commissioners of the City of Wichita, Kansas, providing for appropriate proceedings relating to the taking of said easements or rights-of-way over the land in question.

See Explanatory Note Above.

SECTION 3. This resolution shall take effect and be in force from and after its passage and publication once in the official city paper.

ADOPTED at Wichita, Kansas, this 23th day of April, 1953.

Walt Keeler

Walt Keeler
MAYOR

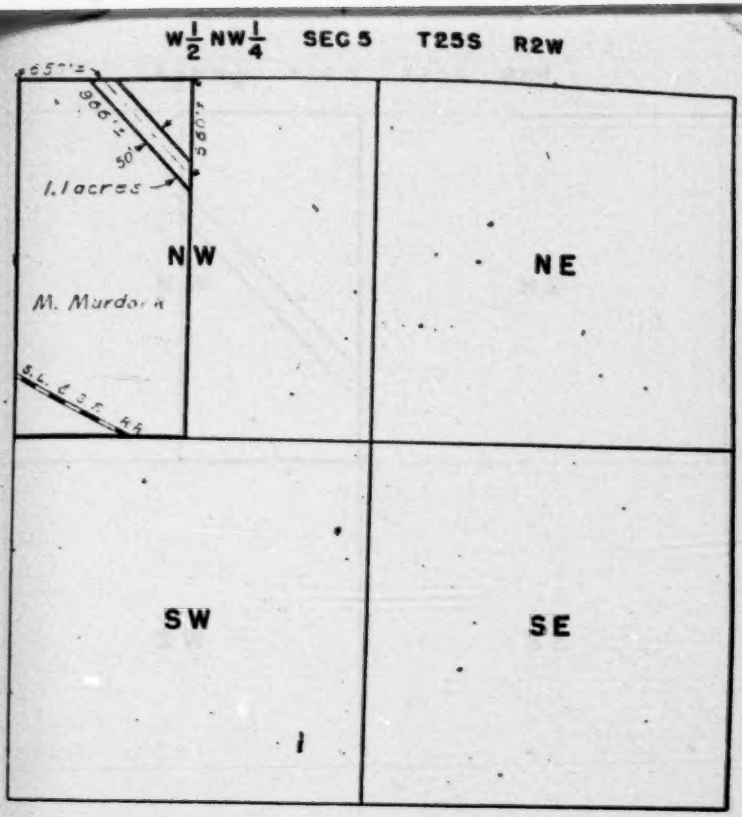
ATTEST:

C. C. Ellis
CITY CLERK

(SEAL)

1-t

See Explanatory Note Above.

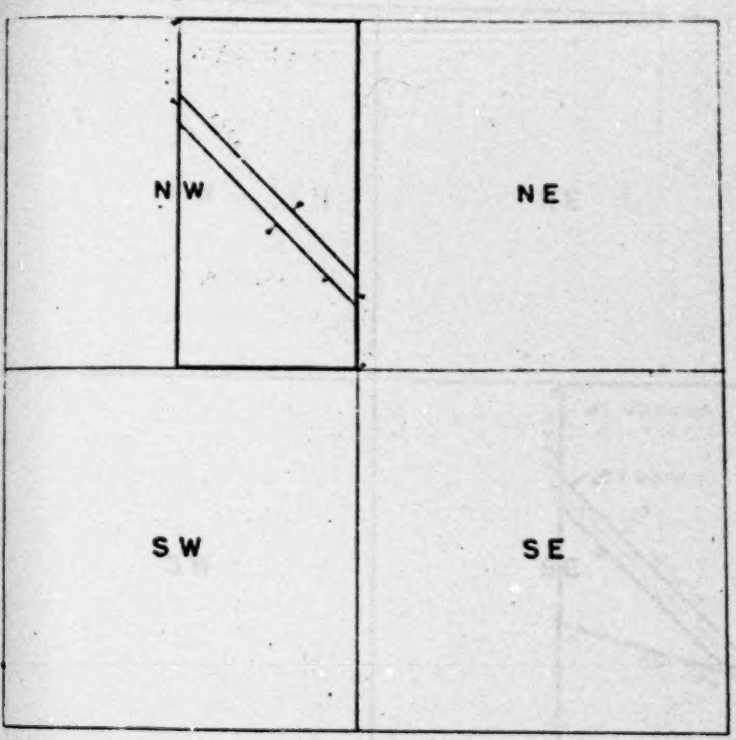


A strip of land 50 feet wide for permanent R/W, including 25 feet on each side of the following described centerline: Begin at a point 660 feet more or less South of the Northeast corner of the W½ NW¼ Sec 5 T25S R2W; thence Northwest 966 feet more or less to a point 650 feet more or less East of the Northwest corner of the NW¼ Sec 5 T25S R2W; containing 1.1 acres more or less.

In addition a strip of land 25 feet wide for temporary R/W, adjacent to and on each side of the above described strip of land; containing 1.1 acres more or less.

See Explanatory Note Above.

E½NW¼ SEC 5 T25S R2W

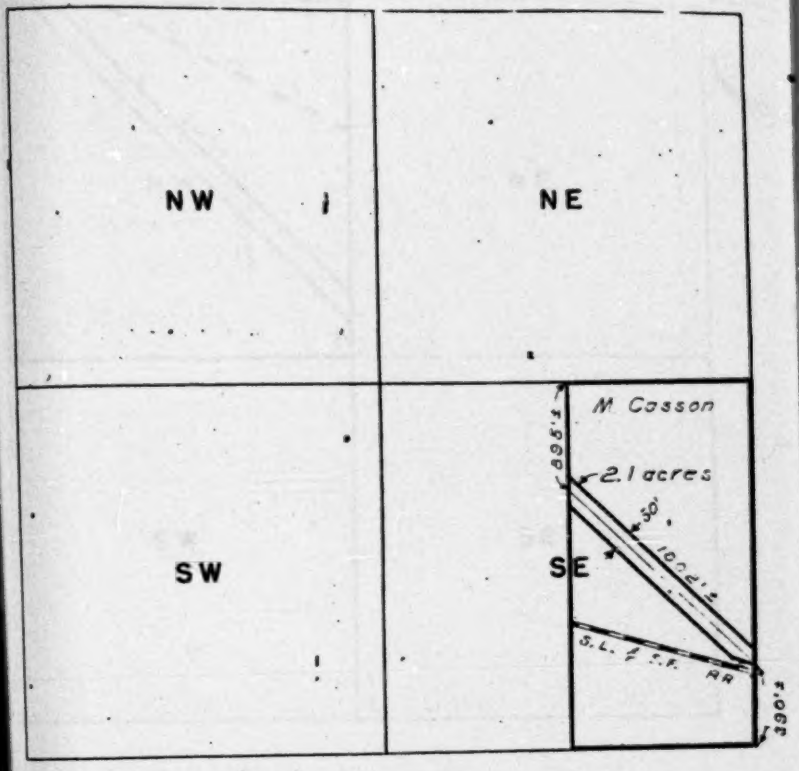


A strip of land 5. feet wide for permanent R/W, including 25 feet on each side of the following described centerline, beginning at a point 325 feet more or less North of the Southwest corner of the E½ NW¼, Sec 5 T25S R2W; thence Northeast 2,52 feet more or less to a point 100 feet more or less South of the Northeast corner of the E½ NW¼, Sec 5 T25S R2W; containing 2.0 acres more or less.

In addition a str., of land 25 feet wide for temporary R/W, adjacent to and on each side of the above described strip of land; containing 2.0 acres more or less.

See Explanatory Note Above.

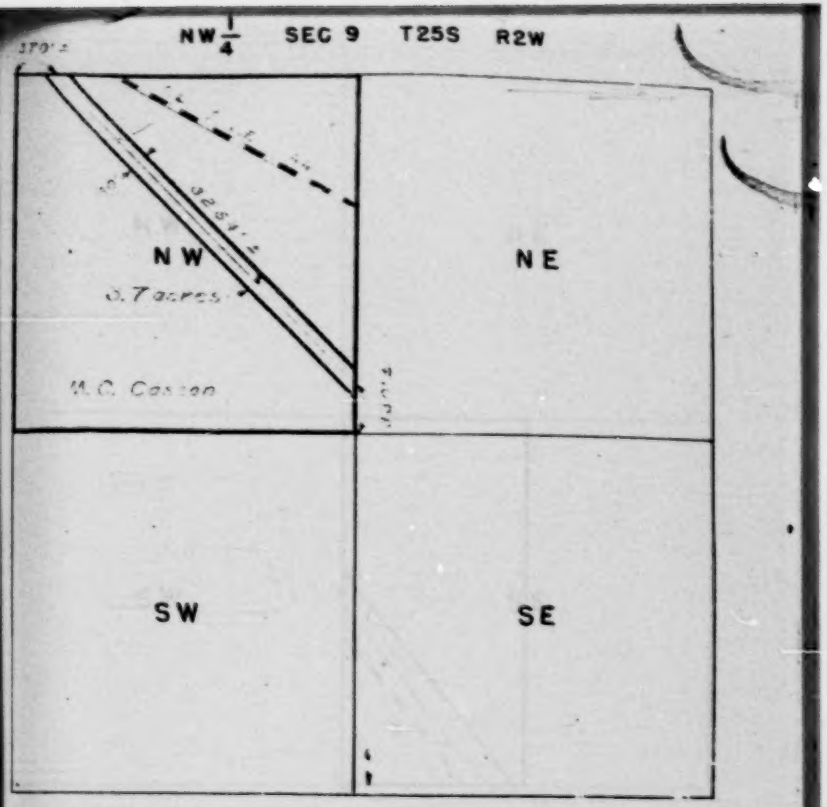
$E\frac{1}{2}SE\frac{1}{4}$ SEC 5 T25S R2W



A strip of land 50 feet wide for permanent R/W including 25 feet on each side of the following described centerline: Begin at a point 390 feet more or less North of the Southeast corner of Sec 5 T25S R2W; thence Northwest 1902 feet more or less to a point 895 feet more or less South of the Northwest corner of the $E\frac{1}{2}$ $SE\frac{1}{4}$ Sec 5 T25S R2W; containing 2.1 acres more or less.

In addition a strip of land 25 feet wide for temporary R/W, adjacent to and on each side of the above described strip of land; containing 2.1 acres more or less.

See Explanatory Note Above.

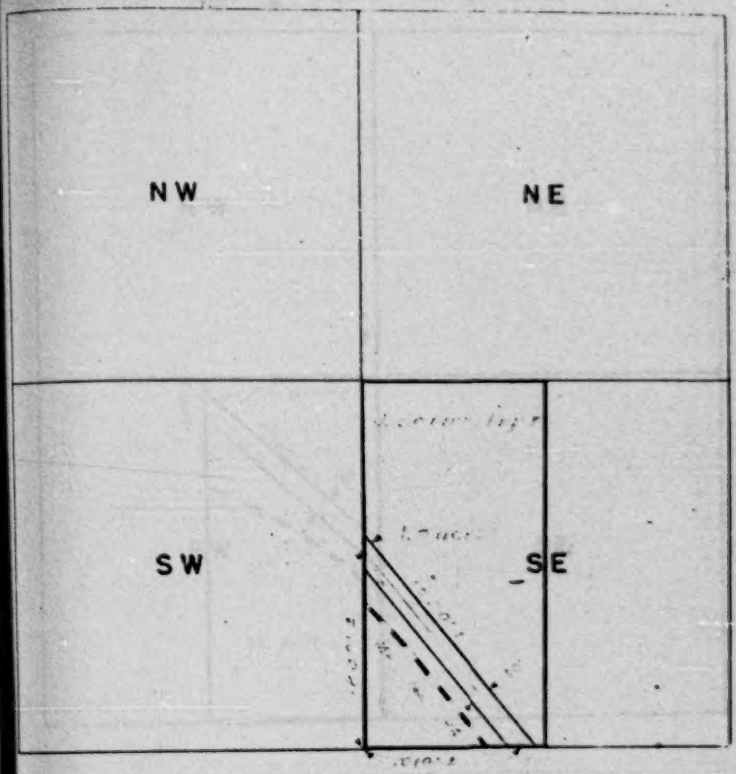


A strip of land 50 feet wide for permanent R/W, including 25 feet on each side of the following described centerlines: Begin at a point 330 feet more or less North of Southeast corner of the NW¼ Sec 9 T25S R2W; thence Northwest 550 feet more or less to a point 370 feet more or less East of the Northeast corner of Sec 9 T25S R2W; containing 3.7 acres more or less.

In addition a strip of land 25 feet wide for temporary R/W, adjacent to and on each side of the above described strip of land; containing 3.7 acres more or less.

See Explanatory Note Above.

W$\frac{1}{2}$SE$\frac{1}{4}$ SEC 18 T26S R1W

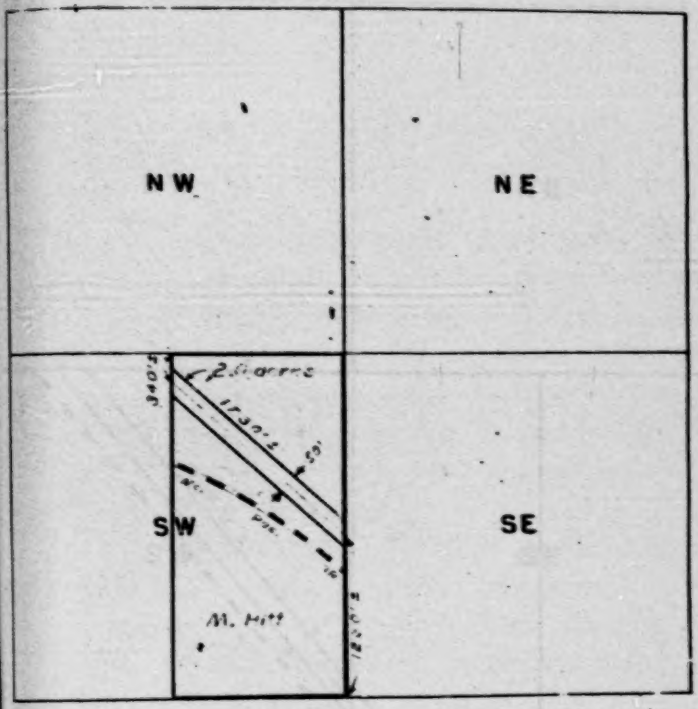


A strip of land 50 feet wide for permanent R/E, including 25 feet on each side of the following described centerline: Begin at a point 1010 feet more or less East of the Southwest corner of the SE ¼ Sec. 18 T26S R1W; thence Northeast 420 feet more or less to a point 1230 feet more or less North of said Southwest corner of the SE¼ Sec. 18 T26S R1W; containing 1.8 acres more or less.

In addition, a strip of land 25 feet wide for temporary R/E adjacent to and on the East side of the above described strip of land; containing 0.9 acres more or less.

See Explanatory Note Above.

E½SW¼ SEC 18 T26S R1W

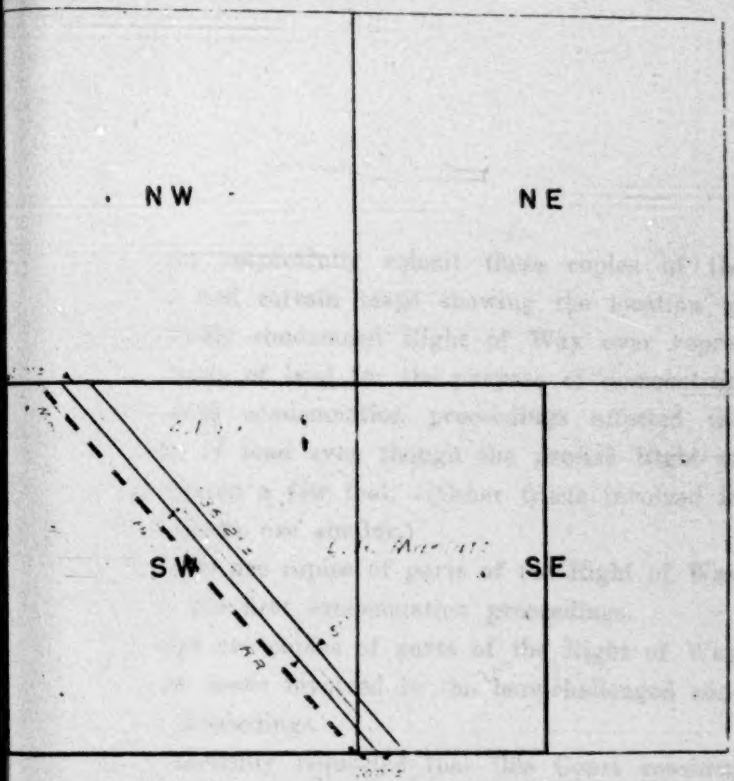


A strip of land 50 feet wide for permanent R/W, including 25 feet on each side of the following described centerline: begin at a point 1230 feet more or less North of the Southeast corner of the SW ¼ Sec. 18 T26S R1W; thence Northwest 1730 feet more or less to a point 340 feet more or less South of the Northwest corner of the E ½ SW ¼ Sec. 18 T26S R1W; containing 2.5 acres more or less.

In addition, a strip of land 25 feet wide for temporary R/W, adjacent to and on each side of the above described strip of land; containing 2.0 acres more or less.

See Explanatory Note Above.

SW$\frac{1}{4}$, W$\frac{1}{2}$SE$\frac{1}{4}$ SEC 20 T26S R1W



A strip of land 50 feet wide for permanent R/W, including 25 feet on each side of the following described centerline: begin at a point 130 feet more or less East of the Southeast corner of the SW¼ sec 20 T26S R1W; thence Northwest 812 feet more or less to a point 510 feet more or less East of the Northwest corner of said SW¼ Sec 20 T26S R1W; containing 4.1 acres more or less.

In addition, a strip of land 25 feet wide for temporary R/W, adjacent to and on the East Side of the above described strip of land; containing 2.0 acres more or less.

See Explanatory Note Above.

Petitioners respectfully submit these copies of the Resolutions and certain maps showing the location of the purportedly condemned Right of Way over representative tracts of land for the purpose of demonstrating that *both* condemnation proceedings affected the *same tracts of land* even though the precise Right of Way was moved a few feet. (Other tracts involved in both proceedings are similar.)

On the *right* are copies of parts of the Right of Way involved in the first condemnation proceedings.

On the *left* are copies of parts of the Right of Way *on the same lands* involved in the here-challenged condemnation proceedings.

It is respectfully requested that this Court consider these as Supplemental Exhibits.

Respectfully submitted.

KENNETH G. SPEIR,
Suite 4, Hanlin Building,
Newton, Kansas,
Counsel for Petitioners.

See Explanatory Note Above.

FILED
OCT 10 1955
HAROLD B. WILLEY, Clerk

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1955.

No. 392.

L. C. COLLINS AND LUCILLE COLLINS, HIS WIFE; EARL SCHNEIDER AND MILDRED SCHNEIDER, HIS WIFE; VOLLIE L. WOODWARD AND LELA E. WOODWARD, HIS WIFE; LEO R. MARLATT AND LEWIS C. MARLATT; *Petitioners*,

vs.

THE CITY OF WICHITA, KANSAS, A MUNICIPAL CORPORATION, *Respondent.*

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

ROBT. B. MORTON,
303 South Main,
Wichita, Kansas,

and

PAUL J. DONALDSON,
344 South Broadway,
Wichita, Kansas,

Counsel for Respondent, City of Wichita, Kansas.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1955.

No. 392.

L. C. COLLINS AND LUCILLE COLLINS, HIS WIFE; EARL SCHNEIDER AND MILDRED SCHNEIDER, HIS WIFE; VOLLIE L. WOODWARD AND LELA E. WOODWARD, HIS WIFE; LEO R. MARLATT AND LEWIS C. MARLATT; *Petitioners,*

vs.

THE CITY OF WICHITA, KANSAS, A MUNICIPAL CORPORATION, *Respondent.*

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

A. STATUTES AND ORDINANCES INVOLVED.

Article XII, Section 5 of the Constitution of the State of Kansas cited in the Petition for Certiorari and set out in Appendix A thereto, is not and has not been involved in this case at any stage of the proceedings.

In addition to the other Kansas Statutes and the Fourteenth Amendment to the Constitution of the United States

cited by petitioners, there is here involved General Statutes of Kansas 1949, 13-1209, which reads:

> "Purchase, construction or extension of waterworks; jurisdiction of city over grounds. That any city of the first class in the state of Kansas shall have full power and authority to purchase, construct or extend waterworks for the purpose of supplying such city and its inhabitants with water, and may maintain, operate and regulate the same, and prescribe the rates at which water shall be furnished; *and any such city may acquire by* purchase or *appropriate proceedings in condemnation all grounds deemed necessary either within or without the city upon which to erect such works, and upon which to lay pipes and mains for the purpose of conveying water to consumers;* and for the purpose of protecting, maintaining and operating such works, any such city shall have the same jurisdiction over any grounds acquired outside of the city for such purposes, as if such grounds were within the city" (Emphasis supplied).

Also material is Ordinance 13-520 of respondent City adopted by its governing body on November 4, 1942, a copy of which is printed in Appendix I, *infra*, page A1.

B. QUESTIONS PRESENTED.

1. Did the Kansas Statutes under which the condemnation was conducted afford due process for appropriation of rights-of-ways outside the City limits?

2. Was the notice of the meeting of the condemnation appraisers given to petitioners by publication ten days in advance of such meeting an adequate fulfillment of the requirements of due process?

3. Does the fact that petitioners filed this action within the thirty day period provided by the Kansas Stat-

utes for an appeal from the condemnation award charge petitioners with actual notice of the proceedings and hence render academic argument as to the efficacy and constitutionality of the constructive notice here given by publication?

4. Is the public purpose of the condemnation destroyed by the fact that water obtained by the respondent City will be conveyed by it through a pipe line in the condemned rights-of-way and thereafter delivered to the Wichita Water Company, a privately owned public utility, under a franchise that obligates the Utility Company to distribute such water to the inhabitants of the City?

5. Was respondent's petition in condemnation in the State Court sufficiently definite and certain?

C. STATEMENT OF THE CASE.

Respondent controverts those portions of petitioners' statement of the case which relate to a condemnation action other than the proceedings here involved. The only proceedings on review are those docketed in the District Court of Sedgwick County, Kansas, as case No. A-51342 (Def. Ex. B; D. C. Rec. 201). All references to a prior condemnation action brought by respondent City docketed in the District Court of Sedgwick County, Kansas, as case No. A-45682 are wholly irrelevant and immaterial.

In refutation to the inference that the prior condemnation proceedings were dismissed by respondent for the purpose of achieving secrecy in conducting these proceedings, it is clearly shown by the record (D. C. Rec. 220) that the prior condemnation action covered lands other than those here involved and that the dismissal of the prior proceedings was entered only because and when the error in the land descriptions was discovered.

Respondent also controverts the statements set out on page 3 of the Petition for Certiorari concerning the alleged circulation and distribution of the newspaper in which the notice was published and shows to this Court that the record of this case is wholly silent as to such matters. The only fact in evidence in that connection is that the paper is one of general circulation in the county where petitioners' lands are located (D. C. Rec. 51).

A condensed version of the facts material to a consideration of the questions here presented is as follows:

On September 7, 1954, the Board of Commissioners of respondent City enacted Ordinance 20-386 (D. C. Rec. 17) declaring the public necessity of acquiring by proceedings in eminent domain described easements and rights-of-way over and through the lands of petitioners and others. The purposes of condemnation and the uses to which the rights-of-way were to be put are stated in the Ordinance as:

> "Laying, installing, maintaining and operating pipes, lines, mains, electrical transmission, control and communication circuits, and other appurtenances necessary for the construction, extension and improvement of the water supply and water works system of the City of Wichita, Kansas, for the purpose of supplying said City and its environs and the inhabitants thereof with water."

The Ordinance further directed the City Attorney to make appropriate application to a Judge of the District Court of Sedgwick County, Kansas, for the appointment of commissioners (appraisers) to appraise the value of the rights-of-way appropriated and to assess the damages resulting to the land owners from such taking. The Ordinance further provided that the cost of the project should be paid from proceeds of general obligation bonds of the City of Wichita authorized to be issued and sold by an affirmative vote of the electorate cast on November 4, 1954.

The lands of petitioners are located beyond the limits of respondent City but within Sedgwick County, Kansas, of which respondent is the County Seat.

Following its adoption, the Ordinance was published in a daily newspaper of general circulation in Sedgwick County, Kansas, on September 8, 1954.

On the day following, respondent filed in the District Court of Sedgwick County, Kansas, its petition in condemnation which was designated as Case A-51342 (Def. Ex. B; D. C. Rec. 201). The aforementioned Ordinance was set out in the petition and it was there further alleged that the acquisition of the described easements and rights-of-way was a public necessity for the public purposes stated in the Ordinance. On the same day, after an examination of the petition and a consideration of the evidence adduced in support thereof, the Sedgwick County District Court found (D. C. Rec. 44) that the allegations of the petition were true; that the City had the power of eminent domain and that the acquisition of the easements and rights-of-way sought to be condemned was necessary to the City's lawful corporate purpose of providing a water supply for its inhabitants. The State Court in the same order appointed three freeholders as condemnation commissioners to assess the damages resulting from the appropriation. The Court further ordered the commissioners to give ten days notice in the official paper of the City of Wichita of the fact of their appointment and of the time and place where they would convene for the assessing and awarding of damages for the taking of the described properties. The Court's order also directed the commissioners to view the premises for the purpose of making such awards.

The required notice was published by the commissioners on September 15, 1954 (D. C. Rec. 50). Contained therein was the style of the condemnation proceedings

and the purposes thereof; a description of the rights-of way sought to be appropriated; the names of the petitioners and other owners of the lands described and a statement that the meeting of the commissioners would be held in City Commission Room 201 of the City Building of Wichita, Kansas, on September 27, 1954, at which time the commissioners would make their awards for the value of the lands taken and the damages resulting to the owners from such appropriation. The commissioners met at the appointed time and on September 28, 1954, filed their report (D. C. Rec. 54) setting forth their awards, in the office of the Register of Deeds of Sedgwick County, Kansas, in the office of the City Clerk of the City of Wichita and in the Sedgwick County District Court condemnation action. The commissioners' report and all proceedings had in the condemnation action were confirmed by the District Court by order entered on September 30, 1954 (D. C. Rec. 83). The title, ownership and right of exclusive possession of the easements and rights-of-way appropriated were thereby declared to be vested in the City of Wichita and the awards to the land owners as deposited in the office of the City Treasurer were declared to be available for payment.

Twenty days thereafter and within the thirty day period provided by General Statutes of Kansas 1949, 26-205, for an appeal from the amount of compensation awarded, petitioners filed the instant action seeking a judgment declaring the condemnation proceedings unconstitutional and void and an injunction permanently restraining respondent City from entering upon their lands.

The Complaint (D. C. Rec. 2) alleged as supporting grounds for requested relief:

> 1. That the notice provisions of the Kansas Condemnation statutes and the notice thereunder given

to appellants were unconstitutional and void for lack of due process.

2. That franchise ordinance 13-520 between the City of Wichita and the Wichita Water Company is illegal and shows that the pipeline rights-of-way condemned were in reality for the private benefit of the Wichita Water Company rather than for an authorized public purpose.

3. That the City's petition in condemnation filed in the State Court action was so lacking in definiteness and certainty that the condemnation proceedings were thereby rendered void.

The franchise ordinance was admitted in evidence (Def. Ex. E; D. C. Rec. 202, *infra*, App. I, p. A1) and its provisions insofar as the same are material to this case are to the effect that respondent City thereby obligates itself to furnish water at a designated place in Sedgwick County, Kansas, to the franchise grantee the Wichita Water Company, a privately owned public utility, and that the latter thereby obligates itself to distribute the water to the City and its inhabitants for domestic, commercial and other uses as well as for the extinguishing of fires.

D. ARGUMENT.

1. The case having been submitted for summary judgment, must be considered in the light of the undisputed facts disclosed by the record evidence. The conclusions set out in the complaint as summarized at pages 11, 12, 13 and 14 of the Petition for Certiorari may not be accepted. The material facts of the controversy simply consist of the State Court condemnation proceedings in case No. A-51342 (Def. Ex. B; D. C. Rec. 201) and the franchise ordinance between respondent City and the

Wichita Water Company (Def. Ex. E; D. C. Rec. 202). Those are in the record in their entirety.

There is no contention that the State Court condemnation proceedings were not conducted exactly as the record evidence discloses; no assertion that the supply and distribution of water to respondent City is not in precise conformity to the terms of the franchise ordinance. That admitted record evidence is thus controlling over the allegations of the complaint.[1]

2. The constitutional right of a landowner to notice and opportunity to be heard in condemnation actions is with respect to the determination of just compensation for the taking but not with respect to the legislative determination of the necessity and expediency of the appropriation. This view has been consistently adhered to by this Court.[2] It has likewise been long settled in Kansas. In *Buckwalter* v. *School District*, 65 Kan. 603, 70 Pac. 605, the Court held:

> "Notice to the citizen of the taking of his property for *public purpose* is of no concern to him for the right to take exists, independently of notice. It is only when compensation for such taking comes to be considered that the owner of the condemned property becomes interested, and only of proceedings to determine that question is he entitled to notice for upon that question only has he a right to be heard" (Emphasis supplied).

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[1] *Engl.* v. *Aetna Life Ins. Co.*, 2 Cir., 139 F. 2d 469, 472:

> "But the history of the development of this procedure shows that it is intended to permit 'a party to pierce the allegations of fact in the pleadings and to obtain relief by summary judgment where facts set forth in detail in affidavits, depositions, and admissions on file show that there are no genuine issues of fact to be tried.' "

[2] *Bragg* v. *Weaver*, 251 U. S. 57.

The reason for the rule is that if the taking is not for a public purpose or is not authorized, the landowner may prevent an entry upon his lands by an injunctive action, or if an entry has been made, he may obtain relief by the way of ejectment or trespass. He has, in fact, sustained no legal injury until his lands are entered upon by the condemning authority.[3] Hence it must here be determined whether the condemnation by respondent City of rights-of-way for the installation of water pipe lines and other works is for an authorized public purpose.

3. The public purpose and statutory authority in Kansas for municipal appropriation of lands outside city limits for the purpose of installing water mains and other works are found in General Statutes Kansas of 1949, 13-1209, *supra*.

4. General Statutes of Kansas 1949, 26-101, referred to in the petition for certiorari relates only to condemnations *other* than by cities and hence is not here material.

Procedure for condemnations *by cities* is found at G. S. of Kansas 1949, 26-201 to 26-208. Consistent with the rule that landowners are constitutionally entitled to notice concerning the determination of just compensation, Section 26-202 requires that notice shall be given to the landowner concerned by the appraisers of the time and place when and where the damages will be assessed, either by ten days notice in writing *or* by one publication in the official city paper ten days in advance. Where the condemnations are of lands *outside* the city limits, Section 26-208 provides that the procedure prescribed by Sections 26-201 to 26-206 shall be followed insofar as it "shall be applicable."

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[3] *Brewster* v. *Rogers Co.*, 169 N. Y. 73, 62 N. E. 164.

As observed by the Court of Appeals in its opinion in this case:

> "It is our view that with respect to notice Section 26-208 contemplates that when property outside the City is being condemnued, notice must be given in a paper in general circulation in the county in which the property is located."

Such would appear to be the only proper construction of the statute. It can be fairly assumed that the Legislature contemplated that in condemnations outside city limits, the provision of Section 26-202 for publication of the notice in the official city paper might not be applicable; that in such instances, in keeping with the fundamental requirement that notice must be reasonably adapted to the nature of the proceedings, publication should be made in a paper of general circulation in the area or county where the appropriated lands are located.

Such notice was in fact given in this case (D. C. Rec. 51) and was expressly approved by the State Court in its order confirming the proceedings (D. C. Rec. 83). In all other respects the procedure provided by Sections 26-201 to 26-206 is "applicable" to the condemnation here involved.

5. It must next be determined whether constructive notice by publication as provided by the Kansas statute affords due process. This Court has uniformly held that eminent domain proceedings being *in rem* in nature, landowners concerned are not entitled to *personal* notice of the meeting of appraisers for the purpose of fixing damages; that adequate publication notice is sufficient and does constitute due process under the Fourteenth Amendment.[4]

---

[4]See *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U. S. 306, 313-14 (1950); *North Laramie Land Co.* v. *Hoffman*, 268 U. S. 276, 283-84 (1925); *Huling* v. *Kaw Valley Railway & Improvement Co.*, 130 U. S. 559 (1889).

6. The remaining question is whether the length of the 10 day notice is sufficient. The essential requirement in that connection is that the notice be reasonably adapted to the nature of the proceedings and afford the property owner a reasonable opportunity to be heard. No case has been found in which a 10 day notice in an *in rem* action has been held lacking in due process. In those instances where the courts have considered publication notices of ten days or less, they have been approved. Three decisions to such effect are:

Pottock v. *Mellott et al.*, 2 Ter. 361, 22 A. 2d 843, a Delaware case, stating that the posting of notice ten days prior to sale of land for taxes was not a denial of due process;

Tilton v. *Decker*, 171 Cal. 731, 154 Pac. 860, holding the Street Opening Act of California provided due process in requiring a ten day publication notice to the landowners affected after an assessment of their damages had been written and filed.

Wynnebago Furniture Mfg. Co. v. *Wisconsin Midland Railroad Company*, 81 Wis. 389, 51 N. W. 576, involved Wisconsin Statutes which provided that a railroad in condemning private lands for its use could give notice of its action by personal service of such notice five days before the hearing in condemnation or by publication notice ten days before the hearing in a paper to be designated by the Court or Judge before whom the hearing was to be held. The Court found that such publication notice to resident and non-resident landowners alike was not a denial of due process of law.

In a very recent decision, *Walker* v. *City of Hutchinson*, 178 Kan. 263, 284 P. 2d 1073 (June 11, 1955), the Kansas Supreme Court upheld the constitutionality of a ten day publication notice given by a city in a condemnation

brought under the same statute involved in this case, General Statutes of Kansas 1949, 26-202.

7. Recognizing that notice and hearing with respect to issue of compensation is the only requirement which must be met, it is of considerable significance that petitioners filed the instant action within the 30 day period allowed by General Statutes of Kansas 1949, 26-205, for an appeal with respect to the amount of compensation awarded. Hence, it follows that the publication notice here given did result in *actual* notice to the petitioners and that thus they have suffered no deprivation of their constitutional right to a timely hearing on the issue of their just compensation.

8. Petitioners challenge the legality of respondent's franchise arrangement whereby the water produced by respondent and conveyed through its pipe lines is distributed to the City and its inhabitants through the instrumentality of the Wichita Water Company, a privately owned public utility. The only aspect of that arrangement material to this case is whether such use by the City of the Water Company as the City's distributing agent destroys the public character of the purpose for which the pipe line rights-of-way in question have been condemned. There is no substantial or meritorious question concerning the point. It has been finally and authoritatively determined in Kansas that the water supply and distribution method employed by the City is in furtherance of a proper and authorized public purpose. The Supreme Court of the State of Kansas has recently so ruled in respect to this very franchise arrangement. The opinion in *State ex rel.* v. *Hedrick*, 178 Kan. 135, 283 P. 2d 437 (May 7, 1955), states that it is apparent from the ordinance that thereby the City obligates itself to furnish water to the utility Company at a designated point, and that the Com-

pany obligates itself to distribute the water to the City and its inhabitants for domestic, commercial and other uses as well as for the extinguishing of fires; that the end result is to supply the City and its inhabitants with water, in itself a legal function under its governmental and police power. The test is whether the principal and paramount purpose is public in character. The courts have consistently held in comparable situations that the public purpose in condemnations is not destroyed by the fact that same incidental benefit will accrue to a private person.[5]

9. While petitioners' contention that the petition in condemnation is lacking in definiteness and certainty does not present a Federal question, there is, nevertheless, no substance to the point. The description of the uses to which the rights-of-way are to be put and the purposes for which they were condemned is expressly stated throughout the condemnation proceedings:

> "for the purpose of laying, installing, maintaining and operating pipes, lines, mains, electric transmission control and communication circuits and other appurtenances necessary for the construction, extension and improvement of the water supply and water works system of the CITY OF WICHITA, KANSAS, for the purpose of supplying said city and its environs and inhabitants thereof with water."

It is submitted that such description with the surrounding circumstances leaves no uncertainty as to the nature of the intended use.

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[5]See decisions cited at 53 A. L. R. 12 in support of the following proposition:

> "The general rule is well settled that the exercise of eminent domain for a public purpose which is primary and paramount will not be defeated by the fact that incidentally a private use or benefit will result which would not of itself warrant the exercise of the power of eminent domain."

10. The decision of the Court of Appeals in upholding the condemnation proceedings is in no manner in conflict with the applicable decisions of this Court nor is it a departure from the accepted and usual course of judicial proceedings. On the contrary the holding is fully consistent with firmly established precedent both in this Court and in the Supreme Court of the State of Kansas.

CONCLUSION.

It is respectfully submitted that the petitioners have advanced no ground or reason to support the issuance of a Writ of Certiorari and it is requested that their petition therefor be denied.

Respectfully submitted,

ROBT. B. MORTON,
303 South Main,
Wichita, Kansas,
PAUL J. DONALDSON,
344 South Broadway,
Wichita, Kansas,
Counsel for Respondent, City of Wichita, Kansas.

Dated: October 7th, 1955.

APPENDIX I.

ORDINANCE 13-520

An Ordinance Granting to the Wichita Water Company, Its Successors and Assigns, the Right and a Franchise to Operate and Maintain a System of Waterworks in the City of Wichita, Kansas, for the Purpose of Supplying and Distributing Water to Said City and Vicinity and Environs and the Inhabitants Thereof, Prescribing the Terms of Said Grant and Relating Thereto.

BE IT ORDAINED BY THE BOARD OF COMMISSIONERS OF THE CITY OF WICHITA, KANSAS:

SECTION 1. That The Wichita Water Company, a corporation, its successors and assigns, be and it is hereby granted the right and a franchise for the purpose of constructing, operating, extending and maintaining and continuing to operate and maintain a system of waterworks in the City of Wichita, Kansas, for the purpose of supplying and distributing water to said City and vicinity and environs and the inhabitants thereof for domestic, commercial, industrial and other uses, as well as for the extinguishment of fires, and subject to the limitations herein stated, said The Wichita Water Company (hereinafter designated as the "Grantee") is granted permission to use such portions of the streets, alleys, avenues, parkways, boulevards and other public grounds of the City of Wichita, as are now used and as may be necessary for the purpose of constructing, operating, extending and maintaining a system of waterworks for the purposes aforesaid.

PROVIDED, that the use of the said streets, alleys, avenues, parkways, boulevards and other public grounds

shall at all times be subject to the right of the City of Wichita under the law to make reasonable rules and regulations relating to the manner of such use and said "grantee" shall never unreasonably interfere with the other proper uses of said streets, alleys, avenues, parkways, boulevards and other public grounds.

SECTION 2. The City of Wichita is hereby given the option of acquiring all of the plant, property and business of Grantee as follows: (1) by purchase, as hereinafter provided, at any time after one year after the effective date of this ordinance, or (2) by condemnation as hereinafter provided, at any time after one year after the effective date of this franchise.

(A) If the City of Wichita shall elect to acquire the property of the Grantee as above provided, by purchase, the following procedure shall govern:

(a) The Board of Commissioners of The City of Wichita shall adopt a resolution conditionally electing to acquire the property of the Grantee, as above described, subject to a favorable vote of the electorate upon the issuance of bonds to pay the cost of such property as is finally determined to be the fair value thereof as is hereinafter set out.

(b) The fair value of the property of the Grantee, as above defined shall be fixed and determined by the majority decision of three disinterested appraisers to be selected as follows:

> One by the said City; one by the Grantee; and the third to be selected by the two thus chosen, or if the two thus chosen fail within five (5) days after their appointment to choose a third, the latter shall, in such event be appointed by the then Chief Justice of the Supreme Court of the State of Kansas. If

Grantee shall fail thus to appoint its appraiser, the said Chief Justice shall do so.

The appraiser to be appointed by the City shall be named within ten (10) days after the effective date of the resolution above provided for. The appraiser to be appointed by the Grantee shall be appointed within five days after written notice by the City to the Grantee of the appointment of its appraiser. No appraisers provided for in this franchise shall be a resident or taxpayer of Sedgwick County, Kansas. All such appraisers shall be competent reputable waterworks engineers.

(c) Said three appraisers, or a majority of them, shall determine the value of said property, plant and business (but not including good will or franchise value), in manner and amount, in elements of value, in good faith and in accordance with the rules of law then obtaining. The property and plant shall include (but without limitation) stand-by equipment and facilities such as duplication of pumps, boilers, and auxiliary equipment, together with all equipment and facilities for the development of water from Grantee's well system and source of supply. There shall be added to the fair value thus ascertained the actual cost of material and supplies on hand and the fair value of all book accounts, and the value of all bills and accounts receivable and water service accrued but not yet billed, as the same existed on the date of said appraisal and the city shall assume all *bona fide* contracts of Grantee for equipment, material and supplies which shall have been made by Grantee prior to the transfer of said property.

(d) Within thirty (30) days after the report is submitted by the appraisers the City shall commence proceedings to submit to the electorate a proposition for the issuance of bonds to provide the funds for the purchase

of the property of the Grantee above provided at the appraised value, plus additions as is herein provided.

(e) In case said bond issue is carried the governing body of the City, by proper ordinance, shall unconditionally elect to take the property of the company, as above provided, within nine months from the date of the election as above provided for, unless litigation results over the proceedings, and the property, appraised as hereinbefore and hereinafter provided, shall be paid for and taken over by the City within a reasonable time after such election and/or the final termination of such litigation, as the case may be.

(f) Before the final taking over of the plant by the City of Wichita, by purchase as is herein provided, the same appraisers, if they are able to act, and if not additional appraisers appointed as is herein provided, shall determine also:

(1) The fair value of any additions and replacements and betterments made since the appraisal and up to the date of the final transfer of the property, less the cost of retirements;

(2) The increase or the decrease as the case may be in the cost of materials and supplies on hand, the fair value of all book accounts, the value of all bills and accounts receivable and the amount of water service accrued but not yet billed, between the time of appraisal and the date of transfer and delivery of the property;

The price previously determined by the appraisers shall be adjusted to reflect the amounts determined under (1) and (2) above.

(g) Proceedings herein shall be governed by the laws then in effect.

(h) The Grantee shall pay its appointed appraiser's fees and expenses. The City of Wichita shall pay its appointed appraiser's fees and expenses. The Grantee and the City shall divide equally the fees and expenses of the third appraiser, together with all incidental expense and costs incurred in making said appraisal.

(i) When the payment for the plant is made, as herein ascertained and provided for, the Grantee shall concurrently deliver to The City of Wichita all of its property as herein provided to be purchased by the City free and clear of all incumbrances, by proper instrument of conveyance. All taxes (whether assessed or not) shall be pro-rated as of the date of said transfer. All net earnings of the property shall accrue and belong to the Grantee until payment of the purchase price by said City. Thereupon all privileges and franchises granted to the Grantee hereunder shall cease and terminate.

(j) In case a bond issue submitted to the electorate for the purchase of the plant of the Wichita Water Company, as is herein provided for, shall not carry, the City shall not be barred from again conditionally electing to exercise its option to purchase under the same procedure as is herein provided for

(k) If, after the City's exercise of said option to purchase, the amount of the fair value of the property purchased should not be paid to the Grantee until after the expiration of the period of this franchise, the City agrees to make adequate provision at that time for the payment of fire hydrant rentals and other charges accruing from the City to Grantee after the expiration of the franchise.

(B) If the City elects to acquire the property of the Grantee by condemnation proceedings, as above provided

for, it may proceed under any law in effect at that time and if the provisions of Section 12-811, 1941 Supplement to General Statutes of Kansas, 1935, or any amendment thereto, be in effect, any commencement of proceedings for condemnation shall be construed as an accelerated expiration under the provisions of the franchise, provided the condemnation proceedings are finally carried through to completion and compensation paid to the Grantee.

SECTION 3. Subject always to the City's aforesaid option to terminate this franchise by purchase or condemnation, as herein provided, and to Section 24 hereof, the term of this grant, contract and franchise shall be for a period of twenty (20) years from and after the taking effect of this ordinance and its acceptance by the Grantee. Provided, however, that if the City shall commence proceedings to acquire the property of the Grantee by condemnation proceedings subsequent to nine years after the effective date of this franchise and prior to ten years after the effective date of this franchise, and prosecute such condemnation proceedings to completion, then in that event this franchise shall be for a period of ten (10) years from and after the taking effect of the ordinance and its acceptance by the Grantee, even though the proposition for a bond issue for the payment of the purchase price is not accepted by the electorate.

SECTION 4. The City, shall during the life of this franchise, deliver to the Grantee, for distribution by it hereunder, an adequate supply of water at all times except when prohibited by unforeseen breaks or other emergencies beyond the City's control, delivering said water into reservoirs or pumping station of the Grantee on Waterworks Island. Provided, however, that in case of temporary discontinuance or inadequacy of the City's said supply of water from any cause, the grantee shall

operate any or all of its then existing wells as may be required to maintain the service. Said water thus to be supplied by the City as well as water supplied by the Grantee from its own sources of supply shall at all times conform in quality with such requirements as may be from time to time established for interstate carriers by the United States Public Health Service. Grantee shall at all times maintain its present well system for emergency use and to augment the supply of water delivered by the City to the Grantee in case of inadequacy.

Commencing with the delivery of said water by the City to the Grantee under this franchise the Grantee will pay to the City $10.00 per million gallons of water for all water so delivered by the City into the reservoir of the Grantee or to its pumping station located on what is known as Waterworks Island. Said water shall be measured by meter or meters owned and maintained by the City. Said meter or meters shall be subject at all reasonable times to inspection and test for accuracy by representatives of said Grantee. If such meter or meters upon test show a variation either fast or slow of greater than two per cent, then and in such case the payment for water delivered by the City shall be adjusted for a period of two months prior to said test, unless within said two months period the meter or meters shall have been tested for accuracy in which case the period covered by the adjustment shall be that which elapsed between the two tests. In the event any meter or meters upon test are found to be not registering, then the amount of water for which payment is to be made shall be estimated, based upon records of the pumpage from Grantee's pumping station. On or before the fifteenth secular day of every calendar month Grantee shall pay the City for water delivered by it to the Grantee during the preceding month.

In addition the Grantee shall pay to the City at the rate of Six Hundred Fifteen Dollars ($615.00) per month commencing with the effective date of this Franchise, said payment to be made on the fifteenth secular day of every calendar month for the preceding month. Said monthly sum of Six Hundred Fifteen Dollars ($615.00) represents the estimated net savings in operating expenses through the distribution of water so supplied by the City as compared with the distribution of water from the Grantee's own facilities. Said sums so paid shall be considered as sums paid for water produced and furnished by the City.

In the event of failure or failures of the City's water supply facilities so as to require the Grantee to operate its own wells for an aggregate of more than fifteen days per annum, then the monthly payments of Six Hundred Fifteen Dollars ($615.00) as aforesaid shall be abated proportionately for the number of days in excess of fifteen that the Grantee is required to operate its wells. Each of the parties hereto pledges its cooperation with the other in carrying forward the operations provided for in this Franchise in such manner as to best promote the public interest.

SECTION 5. All water service shall be by meter measurement, except for extinguishment of fires, and except as herein otherwise provided, which shall be governed by contract between "Grantee" and the consumer, subject to the regulatory jurisdiction of the City, or such other body as may hereafter have jurisdiction over the rules, practices and standards of service of the "Grantee" as may from time to time exist.

SECTION 6. Until such time as they are changed by the Board of Commissioners of the City of Wichita,

or such body or tribunal as shall have jurisdiction thereover, the present regular schedule of meter rates now in effect shall apply and is as follows:

First 25,000 gallons per month or 75,000 gallons per quarter, or any part thereof, 25c per one thousand gallons.

Next 25,000 gallons per month or 75,000 gallons per quarter, or any part thereof, 20c per one thousand gallons.

Next 25,000 gallons per month or 75,000 gallons per quarter, or any part thereof, 15c per one thousand gallons.

Next 25,000 gallons per month or 75,000 gallons per quarter, or any part thereof, 14c per one thousand gallons.

Next 100,000 gallons per month or 300,000 gallons per quarter or any part thereof, 13c per one thousand gallons.

Next 200,000 gallons per month or 600,000 gallons per quarter, or any part thereof, 12c per one thousand gallons.

Next 200,000 gallons per month or 600,000 gallons per quarter, or any part thereof, 10c per one thousand gallons.

Next 200,000 gallons per month or 600,000 gallons per quarter, or any part thereof, 8c per one thousand gallons.

Next 200,000 gallons per month or 600,000 gallons per quarter, or any part thereof 6c per one thousand gallons.

All over 1,000,000 gallons per month or 3,000,000 gallons per quarter, 5c per one thousand gallons.

For consumers classified as residential, metered service shall be subject to a net monthly minimum of Seventy-five Cents (75¢) or quarterly minimum of Two Dollars and Twenty-five Cents ($2.25) for each five-

eighths (5/8) inch meter and for all other classes of consumers the metered service shall be subject to a net monthly minimum of One Dollar ($1.00) or quarterly minimum of Three Dollars ($3.00) for each five-eighths (5/8) inch meter. For all classes of consumers supplied regular service through meters larger than five-eighths (5/8) inch the meter minima shall be as follows:

Size	Rate Per Month	Rate Per Quarter
¾ inch	$ 1.44	$ 4.32
1 "	2.56	7.68
1½ "	5.76	17.28
2 "	10.24	30.72
3 "	23.04	69.12
4 "	40.96	122.88
6 "	92.16	276.48
8 "	163.84	491.52

Flat or assessed rates and off-peak meter rates until otherwise changed, shall be those now being charged. Special contract rates provided for in contracts involving the installation of pipe-lines or facilities, shall remain unchanged and continue in effect in accordance with the terms of said contracts.

SECTION 7. All water bills rendered in accordance with the regular schedule of meter rates set forth in Section 6 hereof, are due and payable when rendered and must be paid at the office of "Grantee" on or before fifteen days thereafter. On all bills so rendered which are paid at the office of the "Grantee" on or before fifteen days after they are rendered, a discount of ten (10) per cent will be allowed:

PROVIDED however, that if such discount shall reduce the amount of the bill below the respective minima

above set forth, then the minimum rate shall be paid, and provided also that no discount shall be allowed on the City's surcharge on minimum accounts.

SECTION 8. The Grantee agrees to add to its own rates and all bills rendered to its consumers, except the City of Wichita and its departments, and to collect for the City (where it may reasonably be done without litigation) upon all amounts collected for itself, until the further ordinances of the City, a surcharge as follows:

(a) To all consumers using water within the City of Wichita and to all industrial consumers as defined by paragraph (a) on page 115 of a book on file in the Water Company's office, entitled "Instructions as to the Use of the Uniform System of Account for Water Utilities Adopted by the National Association of Railroad and Utility Commissioners, including Supplemental Explanation and Additional Subaccounts," fifteen per cent (15%).

(b) To all other consumers, thirty per cent (30%)—calculated on the basis of the regularly established rates in the City of Wichita.

All of the money so collected by the Grantee for the City under the above provisions, during each calendar month, shall be remitted to the City of Wichita on or before the 15th secular day of the following calendar month.

The City shall have the option at any time to change the foregoing surcharges, or any of them, by the enactment of an ordinance and such surcharge or surcharges as is put into effect by such ordinance shall be collected by the Grantee as is herein provided.

If the City should at any time or times, by valid and enforceable ordinance change the foregoing surcharges to

include therein a uniform charge for sewage disposal service, upon bills to water customers whose premises are reported in writing by the City to the Grantee as being connected with public sewers, the Grantee will continue to add and collect the same as hereinbefore provided without cost or expense to the City, always provided that there will be no more than one aggregate percentage surcharge on any consumer's bill.

SECTION 9. The Board of Commissioners of The City of Wichita shall have jurisdiction to fix and determine reasonable rates to be charged for and standards of water service of the "Grantee" and in event the jurisdiction of the said Board of Commissioners of the City of Wichita shall be divested hereafter, then such jurisdiction to fix rates and standards of service shall be from time to time vested in such Court, Board, Commission or other tribunal as may from time to time, be prescribed by law. PROVIDED, HOWEVER, that said Board of Commissioners shall at no time fix or continue a rate which shall prohibit said "Grantee" from earning a reasonable rate upon the fair value of its property used and useful in such public service.

It is further provided, and by the acceptance of this franchise, the "Grantee" agrees that it will not hereafter within the period of two (2) years from the date when this ordinance shall become effective, make application or otherwise seek to have said schedule of rates increased above those specified in this ordinance.

SECTION 10. The Grantee will accept a basic amount of Two Hundred Twenty-Five Thousand Dollars ($225,000.00) per year as the gross income available as a return for its property as it existed December 31, 1941. The amount of $225,000.00 available for a return is defined as the gross operating revenue Grantee receives and retains

from its water customers less operating expenses, maintenance, taxes, and a basic amount for depreciation of Forty-Five Thousand Dollars ($45,000.00) per annum predicated upon the depreciable property as same existed as of December 31, 1941. The Grantee shall be entitled to receive as a return on its property for each year beginning January 1, 1943, the amount of $225,000.00 plus six (6) per cent return and one (1) per cent for depreciation on the cost of all betterments and replacements less the cost of all property abandoned, from and after December 31, 1941, and less six (6) per cent each year on the amount by which the depreciation reserve exceeds the depreciation reserve as shown by the Balance Sheet of the Grantee as of December 31, 1942, it being understood that for the purpose of calculating the balance upon which said six (6) per cent last mentioned is to be computed, no deductions shall be considered from the depreciation reserve, except the cost of all property abandoned and the cost of abandoning such property less its salvage value. If during any calendar year beginning with the calendar year 1943 during the effective period of this franchise, the said gross income of the Grantee is more than $225,000.00 plus six per cent return and one per cent for depreciation on the net cost of betterments and less six per cent (6%) per annum on the increase in the depreciation reserve, as aforesaid, then the Grantee will pay to the City for water delivered to it, in addition to $10.00 per million gallons, an amount equal to one-half of such difference, such additional payment to the City for water to be paid annually within one hundred twenty (120) days after December thirty-first of each calendar year.

The Grantee shall make a report annually to the City on or before April 1st of each year, commencing April 1, 1944, showing for the previous calendar year gross rev-

enues and operating expenses, maintenance, taxes and accruing depreciation in accordance with the classification of accounts used by the Grantee. The Grantee shall also concurrently furnish the City with a statement showing the cost of all betterments and replacements and the cost of all property abandoned from and after December 31, 1941, together with the increase or decrease, as the case may be, in the depreciation reserve from and after December 31, 1942.

The Grantee agrees that the aggregate management charges paid by it under the present or any similar management contract for present or similar services rendered or to be rendered Grantee by any other party or agency and charged as an operating expense of the Grantee, shall not exceed the percentage paid by other water companies in the same affiliated group under similar contracts and shall at no time exceed four per cent (4%) of the gross operating revenues of the Grantee for any calendar year.

SECTION 11. That all public fire hydrants shall be used exclusively for the extinguishment of fires, necessary drill and practice of Fire Department and the flushing of city streets, sewers and gutters; but all use of fire hydrants in the City of Wichita shall be under the direction and control of the Chief of the Fire Department, provided that this provision shall not be construed to authorize the use of water from said hydrants by private sprinkling concerns, except at such reasonable charges therefor and under such reasonable regulations as may be prescribed; and provided further, that this provision shall not be construed to forbid any proper use of the fire hydrants by the Grantee.

SECTION 12. During the term of this franchise the Grantee shall furnish free from fire hydrants to the City

of Wichita, all the water that the City may require for flushing of sewers, gutters and streets, and other reasonable public uses, except for fire protection; but this provision shall not be construed to apply to the commercial use of water for sprinkling of streets.

The rate for all municipal uses, including parks and playgrounds, and except as herein specified shall not exceed 5c per thousand gallons, subject to this minima herein elsewhere stated.

SECTION 13. That in consideration for the benefit that will accrue to the City of Wichita (including the furnishing of water for fire protection) by the operation, maintenance and extension of said system of waterworks, the City agrees to rent and hereby does rent from the said Grantee, its successors and assigns, for and during the term of this franchise, all fire hydrants which were in service at the effective date of Ordinance No. 7744, at an annual rental of Thirty-Seven and 50/100 Dollars ($37.50) each, payable monthly in advance on the first day of each and every month with six per cent interest after due.

That the City shall also rent, from the time of their installation until the expiration or termination of this franchise, or the acquisition of said waterworks by the City of Wichita, any additional fire hydrants which were placed after the effective date of Ordinance No. 7744 or which shall be placed during the existence of this franchise, at the rate of Seven and 50/100 Dollars ($7.50) each per annum. All such additional hydrant rentals shall be paid monthly and in manner as provided in Section 13 of this ordinance.

Provided that when new hydrants are placed upon mains existing at the time of the effective date of this

franchise, the City shall pay the actual cost of such installation, exclusive of the costs of said hydrant and hydrant branches.

SECTION 14. That said Grantee, its successors and assigns, shall extend its water mains of six inch inside diameter or larger to any part of the City of Wichita when ordered to do so by Resolution of the Board of Commissioners. PROVIDED, however, that as to water mains extended by order of the Board of Commissioners since the effective date of Ordinance No. 7744, or extended by order of the Board of Commissioners under this franchise, the City shall pay to the Grantee as annual rental, which rental shall be at the rate of one cent (1c) per "inch-foot" (being one cent per inch inside diameter per lineal foot of pipe) of extension so ordered; PROVIDED FURTHER, that the City shall have the right to order the Grantee to install fire hydrants on extensions ordered hereunder at whatever points the City shall choose, and the Grantee shall install such hydrants at its own cost, when so ordered by the City, and the City shall pay the Grantee, in addition to the rental provided in this section, the rate of Seven and 50/100 Dollars ($7.50) per annum for each hydrant so installed. Such rentals shall be paid in the same manner as provided by the terms of Section 13 hereof for hydrant rentals.

All fire hydrants now installed or which may hereafter be installed by order of the City, shall be considered permanent as to location.

The Grantee shall make extensions of at least seventy-five (75) feet of two (2) inch main for each *bona fide* consumer who shall apply for such extension when adequate service can be furnished through a two (2) inch main.

SECTION 15. All water services, up to two inches (2") in diameter, hereafter installed or renewed, shall

be of extra strong lead pipe or of seamless extra pure copper tubing of not less than sixteen gauge thickness, and cast iron pipe for all services two (2) inches and over in diameter. All joints in all leadwater services between the main and the curb line along the line of the main may be of the lead flange type. PROVIDED, however, that during the war emergency and for such time thereafter as the various materials prescribed and called for hereinabove shall be unobtainable for the purpose of maintaining water service by said Grantee, it shall be lawful and permissible for substitution of said water service materials to be made.

SECTION 16. The Grantee shall furnish, install, replace and maintain, at its own expense, to the curb lines along the line of its mains, all new water services, except special fire services.

Said "Grantee" shall also maintain to the curb line, all services located along its mains, at its own expense, which have heretofore been installed and running into property abutting its mains. PROVIDED, however, that before said "Grantee" shall be required to maintain such services previously and heretofore installed, the owners of each such service shall assign and convey by proper instrument to said "Grantee" the title to said services.

The initial cost of repairing any such service, together with the cost of replacing same, shall be added to the capital account of the Grantee, but nothing other shall be added to such capital account because of the conveyances of such services; and provided further, that in the event of the acquisition of the waterworks system by the City of Wichita hereafter by any means whatsoever, the value of such services, except as above specified, shall not be considered or taken into account in the determination of the value of the properties of the said Grantee.

SECTION 17. That the Grantee shall furnish, install and maintain, at its own expense, all meters used for measuring service to consumers, except those for special fire service, which shall be governed by reasonable rules and regulations to be determined by the tribunal having jurisdiction thereover.

SECTION 18. As compensation to the City of Wichita for granting this franchise, the said Grantee, its successors and assigns, shall pay to the City of Wichita one per cent of the gross receipts derived from the service permitted by this franchise from consumers, located in Wichita and territory immediately adjoining said City but not within the boundaries of any incorporated city or cities except Wichita, said Grantee to make and report to the Board of Commissioners all such gross receipts, once in each six months period and shall pay into the treasury of the City the amount due said City at the time such report is made. If said report be found to be erroneous or the statement thereof incorrect, then payment shall immediately be made upon the corrected statement.

SECTION 19. All water mains and services shall be laid with not less than thirty (30) inches of cover.

SECTION 20. The Grantee shall keep complete books and records pertaining to its business and operation, and the representatives of the City of Wichita shall, at all times, have free access thereto. When requested by the City, the Grantee shall have all or any part, of its said books and records available for inspection and examination by the representatives of said City, at the offices of said Company, in the City of Wichita, Kansas. And in event the use of any or all of such books or records shall be required for use in legal proceedings between the City and the Grantee at any place, the said Grantee shall produce such books and records at the request of said City.

SECTION 21. The grounds of said Grantee and particularly "Waterworks Island," during the term of this grant shall at all times be kept in a neat condition and said "Waterworks Island" may, at the option of, and as directed by the Board of Park Commissioners, be landscaped and beautified as said Board of Park Commissioners of the City of Wichita may direct. Such landscaping and care of grounds may be done and supervised by the Board of Park Commissioners and the cost thereof shall be paid by Grantee as an operating expense. PROVIDED that such landscaping and beautifying shall in no manner interfere with the use of said property for waterworks purposes and that said cost shall not exceed $1,000.00 per year.

SECTION 22. The City of Wichita may pass such ordinances as may be reasonably necesary for the protection of the property of the Grantee and providing for the enforcement thereof by suitable penalties.

SECTION 23. The Grantee may establish, from time to time, such suitable rules and regulations for the conduct of its business and relating to its service, as may from time to time be expedient and necessary, subject, however, to the power of the Board of Commissioners of the City of Wichita to revise or modify the same in a reasonable manner.

SECTION 24. In event of the failure of the Grantee, its successors and assigns, to comply with any and all provisions of this ordinance and franchise or should the Grantee do or cause any act or thing to be done which is prohibited by this franchise, then and in either event the City of Wichita shall have the option to declare this contract and franchise to be forfeited and thereafter the same shall be null and void. PROVIDED, the right of forfeiture shall not be exercised until after Grantee shall have been duly notified in writing by the City of the reasons for the

proposed forfeiture and given a reasonable opportunity to comply with the conditions of the franchise and provided further that in all matters not affecting the public health and safety, it shall be deemed a sufficient compliance if the Grantee shall, within a period not exceeding thirty days, begin the actual work necessary to comply with this ordinance and prosecute the work diligently to completion.

The Grantee shall not be responsible for failure to perform hereunder or subject to the forfeiture of this contract and franchise, due to the breakdown or injury of its waterworks facilities, acts of God or the Public Enemy, impossibility of law or reasons beyond its control, including, but without limitation, unusual demands upon its facilities, and curtailment of its service, on account of war conditions or regulations.

SECTION 25. This ordinance shall be read in full at three regular weekly meetings of the Board of Commissioners and immediately after its final passage shall be published in the official City paper once each week for three (3) consecutive weeks, and if no legal petition shall be filed asking for an election, as provided by Chapter 135, Laws of Kansas, 1941, it shall become effective and be in force after the expiration of sixty (60) days from the date of said final passage and after its due acceptance in writing by said Grantee.

PROVIDED, HOWEVER, that if an election be demanded by the filing of a petition, as provided by law, during the time intervening between its final passage and the expiration of sixty (60) days aforesaid, then the ordinance shall not become effective until after an election shall have been held and said ordinance approved, as provided by the terms of said Chapter 135, Laws of Kansas, 1941.

SECTION 26. That within sixty (60) days after the final passage of this ordinance the Grantee shall file with the City Clerk of the City of Wichita its acceptance in writing of the provisions, terms and conditions of this ordinance, which acceptance shall be duly acknowledged before some officer authorized by law to administer oaths.

This ordinance was duly passed by the Board of Commissioners after a third reading thereof at a third weekly meeting of the Board of Commissioners of the City of Wichita, being finally passed and adopted upon the 2nd day of November, 1942.

/s/ O. F. Sullivan,
Mayor.

Attest:

/s/ C. C. Ellis,
City Clerk.

(Seal)

FILED
OCT 24 1955
HAROLD B. WILLEY, Clerk

No. 392

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1955

L. C. COLLINS AND LUCILLE COLLINS, HIS WIFE;
EARL SCHNEIDER AND MILDRED SCHNEIDER, HIS WIFE;
VOLLIE L. WOODWARD AND LELA E. WOODWARD, HIS WIFE;
LEO R. MARLATT AND LEWIS C. MARLATT,
PETITIONERS,

vs.

THE CITY OF WICHITA, KANSAS,
A MUNICIPAL CORPORATION,
RESPONDENT.

PETITIONERS' REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

KENNETH G. SPEIR,
VERNON A. STROBERG,
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Suite 4, Hanlin Building,
Newton, Kansas,
Counsel for Petitioners.

KANSAS LAW PUB. CO., TOPEKA

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STATUTE AND CONSTITUTIONAL PROVISIONS INVOLVED.

In view of Respondent's assertion of and reliance upon General Statutes of Kansas, 1949, 13-1209, enacted as Chapter 87, Kansas Session Laws of 1911, as its authority to condemn the lands sought to be con-

demned (Respondent's Brief, p. 1, 2 and 9), Petitioners respectfully submit that the title of said act becomes material in view of Section 16, Article 2 of the Kansas Constitution. Both of which are printed in Appendix I, *infra*, pp. 14-15.

STATEMENT.

Petitioners respectfully call the Court's attention to the procedure followed in the lower courts and the basis upon which this case is presented to this Court.

Respondent at no time filed a responsive pleading to Petitioners' Complaint; Respondent's only formal pleading was its Motion to Dismiss, (D. C. Rec. 15), filed pursuant to Rule 12 (b) of the Federal Rules of Civil Procedure, which Motion was, upon presentation, enlarged to a Motion for Summary Judgment.

On the argument, Petitioners and Respondent each introduced certain exhibits, including Defendant's Exhibit "G", being proceeding in Sedgwick County District Court, Case No. A-45682. (D. C. Rec. 131) Whereupon, Petitioners offered Petitioners' Exhibit "1", being copies of certain papers filed in the Sedgwick County District Court, Case No. A-45682, which were not included in Defendant's Exhibit "G". (D. C. Rec. 158-170) Whereupon, the parties agreed that no material issue of fact survived the pleadings and the record evidence, and that the case was ripe for summary judgment. (D. C. Rec. 227) However, it must be remembered that the Respondent *never denied any* of the allegations of the complaint.

In view of the record, Petitioners respectfully submit that Respondent cannot now be heard to controvert any of the allegations of the complaint, nor to deny the correctness or materiality of any of the exhibits, as attempted in its brief. (Respondent's Brief, pp. 3, 4, 5)

Sedgwick County District Court Case No. A-45682 (Def. Ex. G; D. C. Rec. 131; Pl. Ex. 1; D. C. Rec. 158) *is material* and was *so considered* by both the District Court and the Court of Appeals; Respondent having offered such exhibit may not be heard now to contend that it is "wholly irrelevant and immaterial". (Respondent's Brief p. 3)

Furthermore, Respondent's assertion: "that the prior condemnation action covered lands other than those here involved" (Respondent's Brief, p. 3), is misleading, if not in fact untrue. The right-of-way purportedly condemned in the here-challenged proceedings, affects substantially all of the lands that were to have been affected by the prior condemnation case. (See and compare Def. Ex. G; D. C. Rec. 135, 136 with Def. Ex. B; D. C. Rec. 24-32, with particular reference to tracts 6, 11, 38, 40, 42.) Obviously the second condemnation case affected Petitioners' *lands* for the same purpose attempted in the first case, with *only a minor change* in the precise location of the *right-of-way*.

Comparison of all the property sought to be condemned in each proceeding shows that the second proceeding affected or covered, with the omission of a few tracts of land, substantially all of the identical lands affected, or sought to be affected by the first condemna-

tion proceeding with, however, *only a minor change* in the exact location *upon such lands* of the proposed *right-of-way.*

The Respondent's statement: "That the dismissal of the prior proceedings was entered only *because* and *when* the error in the land descriptions was discovered" (Respondent's Brief, p. 3) (Emphasis supplied), is not correct.

The prior proceedings were *not dismissed* until two days *after* the second condemnation proceedings were *completed.* Such conduct speaks much louder than Respondent's words.

There was no error in the *land descriptions* in the first proceeding but, at most, only a possible error as to the precise location of the *right-of-way* sought to be obtained, which could have been readily amended in the original proceedings if they were, in fact, the result of an error.

Respondent is in no position, and may not now attempt, to controvert the Petitioners' statements concerning the circulation and distribution of the newspaper in which the notice was published. (Respondent's Brief, p. 4)

In the first place the affidavit of publication (D. C. Rec. 51) shows on its face not only that the publication notice was published *only* in the "evening issue" of said The Wichita Eagle but also it does not purport to assert that such notice was ever published in the morning issue of said newspaper.

In the second place the affidavit of publication does not purport to say that the "evening issue" is of general circulation in Sedgwick County and the Audit Report of the Wichita Eagle (C. A. Rec. p. 23) conclusively shows that the "evening issue" is not, and was not, of general circulation in Sedgwick County. (See also Petition for Writ of Certiorari, p. 3)

Respondent's assertion: "following its adoption, the ordinance was published in a daily newspaper of general circulation in Sedgwick County, Kansas, on September 8, 1954" (Respondent's Brief, p. 5), is likewise not correct for the reasons above stated.

Petitioners respectfully direct the Court's attention to the fact that even the Respondent has admitted that the Sedgwick County District Court ordered the commissioners to give notice in "the official paper of the City of Wichita" (Respondent's brief, p. 5), which clearly demonstrates that both the Court and the Respondent relied upon and followed the procedure required by General Statutes of Kansas 26-202; without reference to either G. S. 1949, 26-208, or G. S. 1949, 26-101.

The Respondent further recognizes that the commissioners in condemnation met, pursuant to the published notice, in the City Commission room in Wichita, Kansas, and there made their award for the value of the lands taken and the damages resulting from such appropriation (Respondent's Brief, p. 6) and not on, or even near, the lands sought to be condemned, as required by the Order of the Court and the Laws of Kan-

sas. (See Petition for Writ of Certiorari, pp. 26, 27)

Respondent's statement, with respect to the franchise ordinance and the privileges and obligations of the Water Company therein contained, as follows: "The latter thereby obligates itself to distribute the water to the city and its inhabitants for domestic . . . ", (Respondent's Brief, p. 7), is only partly correct. The Franchise ordinance includes not only distribution to the city and its inhabitants, but also "to said city and *vicinity* and *environs* and the inhabitants thereof for domestic . . . " (Def. Ex. E; D. C. Rec. 202; Respondent's Brief, Appendix A1) "Vicinity" and "environs" has been interpreted by the City to justify the Wichita Water Company selling water to the city of El Dorado which is more than 35 miles from the City of Wichita.

ARGUMENT.

1. POWER OF CITY TO CONDEMN.

Respondent, for the first time, has now disclosed the exact statute upon which it bases its supposed power, authority and right to condemn. It is General Statutes of Kansas 1949, 13-1209 (Respondent's Brief, pp. 1, 2, 9), enacted by the Kansas Legislature as Chapter 87 of the Session Laws of 1911. (Appendix I, *infra*, p. 14)

Therefore, it becomes necessary to examine the title to such act in the light of Article 2, Section 16 of the Kansas Constitution, (Appendix I, *infra* p. 15), the material part of which is as follows:

> "No bill shall contain more than one subject which shall be clearly expressed in its title . . . "

The Supreme Court of Kansas has repeatedly held the above provisions of the Constitution to be mandatory.

In the case of *State v. Sholl*, 58 Kan. 507, 49 Pac. 668, the Court, on page 511 of the opinion, said:

> "That the provisions of section 16 of article 2 of the Constitution are mandatory, and that the courts will declare void an act passed in violation of them, is firmly fixed in the jurisprudence of this State." (Citing a number of Kansas decisions.)

The title to the act, Chapter 87, Laws of 1911, (Appendix I, *infra* p. 14) relied upon by the Respondent, is as follows:

> "An Act authorizing cities of the first class to purchase, construct or extend waterworks, and to maintain, operate, regulate and protect the same."

Nowhere in the title is anything said or implied with respect to granting or conferring the power of Eminent Domain.

The Supreme Court of Kansas, in the case of *Enterprise v. Smith*, 62 Kan. 815, 62 Pac. 324, held that a similar title to another act relating to water-works in cities of the third class which was also claimed to grant power of Eminent Domain, was invalid. On page 817 of the opinion the Court said:

> "Eliminating all of this title which does not pertain to the acquisition of water-works property, it reads as follows:
>
> 'An act authorizing and empowering cities . . . to obtain . . . water . . . by purchasing or constructing, owning and operating water-works.'

> It is seen, therefore, that the title of the act does not express the subject of condemnation as a means of acquiring water-works property, but expresses only the subject of its acquisition by purchase. Is the word 'purchase', or its participle, 'purchasing', used in the title, comprehensive enough to include condemnation? We think not."

and on page 820 of the opinion, also said:

> "It must be borne in mind that section 12 of the statute under consideration attempts to exert the sovereign power of dispossessing the citizen of his property. All the authorities hold that such statutes are to be strictly construed. No effect by implication or intendment other than that which is reasonable and necessary is allowed to them. For like reasons the same must be said of the titles to such enactments. Nothing should be regarded as comprehended within their titles except that which can with reasonably clear distinctness of view be seen. We are, therefore, constrained to hold that the title to the act in question does not embrace the subject of condemnation of property for water-works purposes. We regretfully come to this conclusion, because the statute is of much interest and is beneficial in its object; but it is better that its defects be pointed out at this early date after its enactment, so that the legislature may have like early opportunity to correct them."

The applicability of the above case to the pending case is clearly apparent and is controlling. Therefore, the Respondent does not have, and never has had, any valid power or authority to condemn any part of the lands sought to be condemned by either of the proceedings.

2. RESPONDENT'S ELECTION OF CONDEMNATION STATUTE IS BINDING.

In its opinion, the Court of Appeals recognized that the Respondent and the State Court proceeded under G. S. 1949, 26-202. However, in view of the Kansas rule as announced in syllabus 2 of *Enterprise v. Smith*, 62 Kan. 815, 62 Pac. 324, as follows:

> "A plaintiff who elects to pursue one of two statutory remedies, which differ from each other in certain forms of procedure, and who avers in his petition that he has elected the remedy of such particular statute, and who, upon the hearing of his claims under it, is defeated because of its constitutional invalidity, cannot, upon error to this court, elect to treat his petition as filed under the other statute."

the following assertion by the Court of Appeals: "The fact that the parties thought they were giving the notice pursuant to Sec. 26-202, is immaterial" (Opinion pp. 50 and 51 of Petition for Writ of Certiorari), cannot be sustained.

Respondent having elected to proceed under G. S. 1949, 26-202, and the State Court having directed notice to be published in accordance with such statute, (D. C. Rec. 46), the Respondent may not now attempt to "change horses", nor may this, or any other, Court adopt any other statute for the Respondent.

Respondent recognized the situation when it stated that G. S. 1949, 26-101, "*is not here material*" (Respondent's Brief, p. 9) and further recognized that G. S. 1949, 26-202, was not adequate under the circumstances of this case:

> "It can be fairly assumed that the Legislature contemplated that in condemnations outside city limits, the provision of Section 26-202 for publication of the notice in the official city paper might not be applicable; that in such instances, in keeping with the fundamental requirement that notice must be reasonably adapted to the nature of the proceedings, publication should be made in a paper of general circulation in the area or county where the appropriated lands are located." (Respondent's Brief, p. 10)

The statute being inadequate, the proceedings are invalid.

3. NOTICE BY CHANCE IS NOT DUE PROCESS.

Respondent argues because Petitioners *just happened* to learn of the condemnation, that they were accorded "due process". (Respondent's Brief, p. 12)

This Court in the case of *Coe v. Armour Fertilizer Works*, 237 U. S. 413, 59 L. Ed. 1027, said:

> "Nor can extra-official or casual notice, or a hearing granted as a matter of favor or discretion, be deemed a substantial substitute for the due process of law that the Constitution requires. In Stuart v. Palmer, 74 N. Y. 183, 188, 30 Am. Rep. 289, which involved the validity of a statute providing for assessing the expense of a local improvement upon the lands benefited, but without notice to the owner, the court said: 'It is not enough that the owners may by chance have notice, or that they may as a matter of favor have a hearing. The law must require notice to them, and give them the right to a hearing and an opportunity to be heard.' The soundness of this doctrine has repeatedly been recognized by this court."

Furthermore, Petitioners are challenging the *validity* of the condemnation proceedings, which under Kansas law can *only be done* in a separate suit. *State v. Boicourt Hunting Assn.*, 177 Kan. 637, 282 Pac. 2d 395. Petitioners could not appeal from the award and also challenge validity of the proceedings but had to elect which remedy to pursue. *Reisner v. Strong*, 24 Kan. 410 (Dassler's Ed., 24 Kan. 297).

4. THE POWER AND AUTHORITY OF RESPONDENT IS CHALLENGED GENERALLY.

Respondent seeks to limit the questions presented by asserting that the only aspect of its authority that is material, is the franchise arrangement with the Water Company in relation to the public character of the purpose of condemnation.

Question 5 presents that question (Petition for Certiorari, p. 4) but Question 6 directly challenges the authority of the Respondent to condemn irrespective of the question of public purpose. (Petition for Certiorari, pp. 4, 5, 22-25)

5. RESPONDENT'S PROPOSED USE IS NOT DISCLOSED.

There is no discernible limit on the purpose or use to which Respondent may put the land sought to be condemned. The stated purpose:

> "for the purpose of laying, installing, maintaining and operating pipes . . . *and other appurtenances* . . . for the construction, extension and improvement of the *water supply* and *water works system* . . . *for the purpose of supplying* said city and its environs and inhabitants thereof *with water*"

is wholly and completely without any limitation whatsoever, the Respondent would be free to make almost any installation or use under the guise of "an appurtenance to extend or improve its water supply or water works system". *Cincinnati v. Vester*, 281 U. S. 439, 74 L. Ed. 950, 50 S. Ct. 360, is the complete and controlling answer to such a situation. (Petition for Certiorari, pp. 17-19)

Petitioners insist upon their *right* to inquire and *be fully informed* as to just what are "the surrounding circumstances" referred to by Respondent in the statement:

> "It is submitted that such description *with the surrounding circumstances* leaves no uncertainty as to the nature of the intended use". (Respondent's Brief, p. 13) (Emphasis supplied.)

None of such "surrounding circumstances" were set forth in the Petition to condemn, filed in the State Court (D. C. Rec. 20), although Petitioners have consistently attempted to obtain information as to Respondent's true purpose. (D. C. Rec. 141)

Due process requires Respondent to fully disclose all the purposes and uses intended and also "the surrounding circumstances".

CONCLUSION.

Petitioners respectfully submit that this Court should grant the requested Writ of Certiorari and summarily reverse the lower Courts.

Respectfully submitted,

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APPENDIX I.

STATUTE:

Laws of Kansas, Session Laws of 1911, p. 144, Chapter 87.

An Act authorizing cities of the first class to purchase, construct or extend waterworks, and to maintain, operate, regulate and protect the same.

Be it enacted by the Legislature of the State of Kansas:

SECTION 1. That any city of the first class in the State of Kansas shall have full power and authority to purchase, construct or extend waterworks for the purpose of supplying such city and its inhabitants with water, and may maintain, operate and regulate the same, and prescribe the rates at which water shall be furnished; and any such city may acquire by purchase or appropriate proceedings in condemnation, all grounds deemed necessary either within or without the city upon which to erect such works, and upon which to lay pipes and mains for the purpose of conveying water to consumers; and for the purpose of protecting, maintaining and operating such works, any such city shall have the same jurisdiction over any grounds acquired outside the city for such purposes, as if such grounds were within the city.

SEC. 2. Any such city shall have the power and authority to issue bonds under the provisions of chapter 101 of the Laws of Kansas of 1905, and the bonds so issued or the proceeds derived from the sale of the same, or such part thereof as may be necessary, may be used by such city for the purpose of acquiring said grounds and for the purpose of purchasing, constructing or extending such waterworks.

SEC. 3. This act shall take effect and be in force from and after its publication in the official state paper.

Approved March 13, 1911.

Published in official state paper March 25, 1911.

CONSTITUTION:

Constitution of Kansas, Article 2, Section 16.

Subject and title of bills; amendment of laws.

No bill shall contain more than one subject, which shall be clearly expressed in its title, and no law shall be revived or amended, unless the new act contain the entire act revived or the section or sections amended, and the section or sections so amended shall be repealed.